

IN THE

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Supreme Court of the United States

MICHAEL RODAK, JR., CLERK

OCTOBER TERM, 1972

No. **72-694**

COMMITTEE FOR PUBLIC EDUCATION AND RELIGIOUS LIBERTY,
BERT ADAMS, BERNARD BACKER, ALGERNON D. BLACK,
THEODORE BROOKS, HERSCHEL CHANIN, NAOMI A. COWEN,
ROBERT B. ESSEX, FLORENCE FLAST, REBECCA GOLDBLUM,
BENJAMIN HAIBLUM, MARTHA LATIES, BLANCHE LEWIS,
ELLEN A. MEYER, EDWARD D. MOLDOVER, ARYEH NEIER,
DAVID SEELEY, ALBERT SHANKER, HOWARD M. SQUADRON
and CHARLES H. SUMNER,

Appellants,

—against—

EWALD B. NYQUIST, as Commissioner of Education of the
State of New York, ARTHUR LEVITT, as Comptroller of
the State of New York, and NORMAN GALLMAN, as Com-
missioner of Taxation and Finance of the State of New
York,

Appellees,

—and—

GERALDINE M. BOYLAN, PRISCILLA L. CHERRY, JOAN M. DUCEY,
NORA H. FERGUSON, ANGELINA M. FERRARELLA, ERNEST E.
ROOS, JR. and ADAMINA RUIZ,

Appellees,

—and—

SENATOR EARL W. BRYDGES, as Majority Leader and
President Pro Tem of the New York State Senate,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

JURISDICTIONAL STATEMENT

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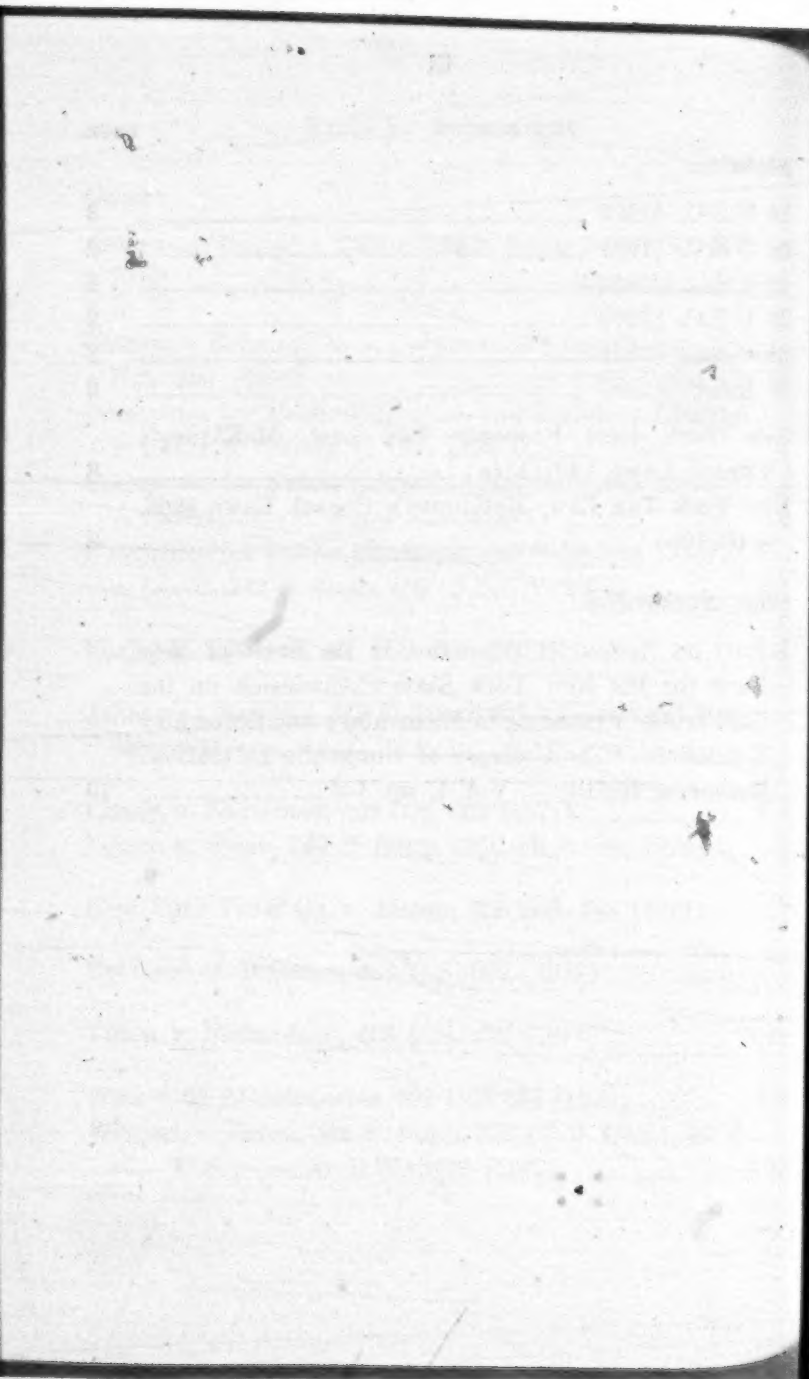
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and CHARLES H. SUMNER,

—against—

Appellants,

ALD B. NYQUIST, as Commissioner of Education of the
State of New York, ARTHUR LEVITT, as Comptroller of
the State of New York, and NORMAN GALLMAN, as Com-
missioner of Taxation and Finance of the State of New
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Appellees,

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OOS, JR. and ADAMINA RUIZ,

—and—

Appellees,

NATOR EARL W. BRYDGES, as Majority Leader and
President Pro Tem of the New York State Senate,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

JURISDICTIONAL STATEMENT

The appellants herein submit this Statement to show that this Court has jurisdiction of their appeal from so much of the judgment and order of the United States District Court for the Southern District of New York as (a) declares that Sections 3, 4 and 5 of Chapter 414 of the 1972 Laws of New York do not violate the Establishment Clause of the First Amendment of the United States Constitution; (b) grants defendants' and intervenor-defendants' motion for summary judgment with respect to Sections 3, 4 and 5 of Chapter 414 of the New York Laws of 1972; and (c) dismisses the complaint herein insofar as it seeks a permanent injunction against enforcement of Sections 3, 4 and 5 of Chapter 414 of the New York Laws of 1972.

Opinions Below

The opinions of the three-judge statutory court are as yet unreported. Copies are set forth as Appendix A hereto beginning at page 1a.

Jurisdiction

This suit was commenced by the appellants herein pursuant to United States Code, Title 28, Sections 1331, 1343 (3), 2281, 2283 and 2202. The complaint challenged the constitutionality of three parts of New York Laws of 1972, Chapter 414 (hereinafter referred to as the Act), set forth as Appendix B hereto beginning at page 47a. The defendants named were Ewald B. Nyquist, Commissioner of Education of the State of New York, Arthur Levitt, Comp-

troller, and Norman Gallman, Commissioner of Taxation and Finance. Thereafter parents of children enrolled in nonpublic schools were permitted to intervene as parties defendant, and like permission was given to Hon. Earl W. Brydges, Majority Leader and President *pro tempore* of the New York State Senate. The judgment and order of the District Court, upholding in part and dismissing in part the complaint herein, was entered on October 20, 1972 and a copy thereof is set forth as Appendix C hereto, at page 59a. The appellants' notice of appeal was filed in the District Court on October 31, 1972 and a copy thereof is set forth as Appendix D hereto, at page 63a.

The jurisdiction of this Court to review the judgment and order by direct appeal is conferred by Title 28, United States Code, Section 1253. Decisions of this Court upholding jurisdiction include *Tilton v. Richardson*, 403 U.S. 672 (1971), *Lemon v. Kurtzman*, *Earley v. DiCenso* and *Robinson v. DiCenso*, 403 U.S. 602 (1971).

Statutes Involved

The statute involved in this appeal is Chapter 414 of the New York Laws of 1972, set forth as Appendix B hereto, beginning at page 47a.

Questions Presented

1. Do Sections 3, 4 and 5 of Chapter 414 of New York Laws, 1972, which provide tax credits for tuition paid to church-controlled and church-operated elementary and secondary schools violate the Establishment Clause of the First Amendment to the United States Constitution?

2. Are Sections 3, 4 and 5 severable from Sections 1 and 2 of the statute?

Statement of the Case

Chapter 414, the fourth of a series of laws enacted within two years which have been challenged as violative of the Establishment Clause,¹ contains five parts: (1) Section 1, which provides moneys to nonpublic schools for maintenance and repairs; (2) Section 2, which provides flat tuition grants to parents of pupils of low income families attending nonpublic schools; (3) Sections 3, 4 and 5, providing for tax benefits for parents in middle and upper income families; (4) Sections 6 and 7, providing for impacted aid to public schools which have increased enrollment due to the closing of nonpublic schools, and (5) Sections 8, 9 and 10 which provide for the purchase of nonpublic school buildings by public school districts where the nonpublic school has closed down.

It is conceded by all parties that the nonpublic schools referred to throughout the Act include schools which (1) are

¹ Chapter 138, Laws of 1970, financing "mandated services" in nonpublic schools, was declared unconstitutional in *Committee for Public Education and Religious Liberty v. Levitt*, 342 F. Supp. 439 (S.D.N.Y. 1972); an appeal from that decision is pending in this Court. No. 72-270. Chapter 822 Laws of 1971, providing for payment of salaries of nonpublic school teachers, was held unconstitutional in *Committee for Public Education and Religious Liberty v. Levitt*, S.D.N.Y. 1971, unreported; no appeal was taken from that judgment. Chapter 996, Laws of 1972, confers jurisdiction on the State Court of Claims to accept claims from nonpublic schools for loss of payments by reason of the invalidation of the "mandated service" law; a suit challenging the constitutionality of the statute is pending in the United States District Court for the Southern District of New York, *Committee for Public Education and Religious Liberty v. Court of Claims*, 72 Civ. 2493.

controlled by churches or religious organizations, (2) have as their purpose the teaching, propagation and promotion of a particular religious faith, (3) conduct their operations, curriculums and programs to fulfill that purpose, (4) impose religious restrictions on admissions, (5) require attendance at instruction in theology and religious doctrine, (6) require attendance at or participation in religious worship, (7) are an integral part of the religious mission of the sponsoring church, (8) have as a substantial and dominant purpose the inculcation of religious values, (9) impose religious restrictions on faculty appointments, and (10) impose religious restrictions on what the faculty may teach.

As explained by Judge Gurfein (pp. 7a-8a *infra*), Sections 3, 4 and 5 of the Act provide that an individual shall be entitled to subtract, for State income tax purposes, from his Federal adjusted gross income an amount shown in a table for his New York adjusted gross income, multiplied by the number of his dependents, not exceeding three, attending a nonprofit nonpublic school on a full time basis, provided that he has paid at least fifty dollars in tuition for each such dependent.² This exclusion may be taken

² The table is as follows:

<i>If New York adjusted gross income is:</i>	<i>The amount allowable for each dependent is:</i>
Less than \$9,000	\$1,000
9,000-10,999	850
11,000-12,999	700
13,000-14,999	550
15,000-16,999	400
17,000-18,999	250
19,000-20,999	150
21,000-22,999	125
23,000-24,999	100
25,000 and over	0

(continued on following page)

only by parents with adjusted gross incomes of from \$5,000 under Section 2. The exclusion would be as much as \$1,000 for each child, up to three children, enrolled in grades 1 through 12 with the net benefit to taxpayers as shown in the footnote. The amount of income that may be excluded is reduced as the individual's adjusted gross income increases. The exclusion is deducted from adjusted gross income and is available to taxpayers whether they itemize or take the standard deduction.

The appellants herein, an organization committed to the protection of public education and religious liberty and a number of taxpayers some of whom are parents of children attending public schools, instituted suit challenging the constitutionality under the Establishment and Free Exercise Clauses of only parts 1, 2 and 3 of the Act, and seeking judgment declaring their unconstitutionality and enjoining their enforcement.

Separate motions for intervention as parties defendant were made by a group of parents of children in nonpublic schools and by State Senator Earl W. Brydges, as Majority Leader and President *pro tempore* of the New York State Senate. Both motions were granted.

Estimated Net Benefit to Family (see p. 45a *infra*).

<i>One Child</i>	<i>Two Children</i>	<i>Three or more</i>
\$50.00	\$100.00	\$150.00
42.50	85.00	127.50
42.00	84.00	126.00
38.50	77.00	115.50
32.00	64.00	96.00
22.50	45.00	67.50
15.00	30.00	45.00
13.75	27.50	41.25
12.00	24.00	36.00
-0-	-0-	-0-

A three-judge court was duly convened, consisting of Circuit Court Judge Paul R. Hays and District Court Judges John M. Cannella and Murray I. Gurfein. After a hearing on the merits, the Court unanimously held parts 1 and 2 of the Act violative of the Establishment Clause. As to part 3, the Court was divided: Judges Cannella and Gurfein in an opinion written by the latter, held that this part did not violate the Establishment Clause; Judge Hays dissented. Judges Cannella and Gurfein also held that part 3 was severable from parts 1 and 2, and as to this too Judge Hays dissented.

The Questions Are Substantial

I. The Establishment Clause

We submit respectfully that Sections 3, 4 and 5 of Chapter 414 are an ingenious attempt to do by indirection what it is forbidden to do directly, namely finance tuition payments to schools that provide sectarian instruction and religious worship. We suggest that sophisticated devices such as this are no less immune to judicial challenge than the more simplistic ones of salary supplements,³ "purchase of services" payments,⁴ "mandated services" payments,⁵ assignment of publicly employed personnel to teach in church schools,⁶ maintenance payments,⁷ and tuition reimburse-

³ Invalidated in *Earley v. DiCenso*, *supra*; *Johnson v. Sanders*, 319 F. Supp. 421, affirmed 403 U.S. 955 (1971).

⁴ Invalidated in *Lemon v. Kurtzman*, *supra*.

⁵ Invalidated in *Committee for Public Education and Religious Liberty v. Levitt*, 342 F. Supp. 439 (S.D.N.Y. 1972).

⁶ Invalidated in *Americans United v. Oakey*, 339 F. Supp. 545 (D.C. Vt., 1972).

⁷ Invalidated in the instant case.

ments.* Since many low-income parents do not pay any state income tax, the more sophisticated device of tax exclusions is not available, so tuition grants have to be used; but the purpose and effect are exactly the same. It is hardly a coincidence that as noted by Judge Hays (*infra*, p. 45a) the tax exclusion benefits begin just about where the tuition benefits stop, i.e., about \$50 per child.

The majority in the District Court based its decision primarily if not exclusively on *Walz v. Tax Commission*, 397 U.S. 664 (1970). That case upheld the constitutionality under the Establishment Clause of laws exempting church property from real estate taxation. But Chapter 414 is not a tax exemption statute. Every one of the nonpublic schools in the State of New York (other than profit making schools which in any event are not within the compass of the statute) is already tax exempt⁹ and Chapter 414 adds nothing to their exemption.

Even if it be assumed that tax deductions for contributions to churches are within the ambit of *Walz* and are constitutional (not yet decided by this Court), and even if it be assumed that tuition to church schools is constitutionally equivalent to contributions to churches (strongly challenged by Judge Hays, *infra*, p. 44a), the fact remains that Chapter 414 is not a tax deduction statute. Contributions to church schools are already deductible under New York law,¹⁰ and Chapter 414 specifically provides that its benefits are available even if the taxpayer elects not to itemize

* Invalidated in *Wolman v. Essex*, 342 F. Supp. 399 (E.D. Ohio), affirmed — U.S. —, 41 L.W. 3167 (1972), *Lemon v. Sloan*, 340 F. Supp. 1356 (E.D. Pa., 1972), and in the instant case.

⁹ N. Y. Real Property Tax Law Sec. 421(1)(a) (McKinney Supp. 1971).

¹⁰ N. Y. Tax Law Sec. 360(10b) (McKinney 1966).

his contributions. Moreover, and most important, in deductions the amount deducted from reportable income is the amount of the contribution; Chapter 414 does not measure the exclusion by the amount of tuition paid by the taxpayer but by the amount of his gross income and the number of children he has in nonpublic schools. There is all the difference in the world between a deduction of \$150 from the reportable income of a man with three children attending a nonpublic school and a deduction of \$3,000, which is what Chapter 414 authorizes.

We note too that in *Walz* both the Court's opinion by the Chief Justice (397 U.S. at 675-679) and the concurring opinion of Mr. Justice Brennan (at 681) stressed that tax exemption for churches went back to the earliest days of the Republic; both quoted the comment of Mr. Justice Holmes in *New York Trust Co. v. Eisner*, 256 U.S. 345, 349 (1921) that "a page of history is worth a volume of logic." Both stressed the fact that tax exemption for churches is a universal practice in effect in every one of the states. The antiquity and ubiquity of tax exemption is strong if not conclusive evidence of constitutionality. Chapter 414 does not come to the Court with that protection. It is a novel device fashioned to evade the constitutional barrier to tuition grants.

Finally, the Court in *Walz* emphasized that the legislature has not singled out one particular church or religious group or even churches as such; rather, it has granted exemption to all houses of worship within a broad class of property owned by non-profit, quasi-public corporations which include hospitals, libraries, playgrounds, scientific, professional, historical, and patriotic groups.

• • • (*Ibid.*, at p. 672)

Chapter 414, on the other hand, does single out nonpublic schools (of which all but 6.5% are religious schools)¹¹ for preferential treatment. A taxpayer who contributes \$150 to a hospital or library or playground can deduct only that amount from his reportable income; but if he pays \$150 in tuition (for which he gets in return at least some secular education for his children) he may deduct as much as \$3,000. This, we submit, is not a tax deduction; it is a thinly disguised tax credit,¹² which in turn is a thinly disguised tuition grant. We can see no realistic or constitutional distinction between the situation in which a parent makes out his tax return like all other taxpayers and gets back from the state a check for the amount of his children's tuition to a church school (tuition reimbursement) and one in which he simply deducts that amount from the amount of his completely unrelated tax liability (tax credit); nor between the latter and a situation such as in the instant case in which the state figures out for him what he has to deduct in his tax return to effectuate the tax credit (Chapter 414).

In its opinion in *Wolman v. Essex*, *supra*, the District Court said:

• • • While the ingenuity of man is apparently limitless, the Court has held with unvarying regularity that

¹¹ "The Collapse of Nonpublic Education: Rumor or Reality?" Report on Nonpublic Education in the State of New York for the New York State Commission on the Quality and Financing of Elementary and Secondary Education, Vol. 1, pp. 1-6. It should be noted too that some of the 6.5% nonreligious schools may be profit making, and hence not within the coverage of Chapter 414.

¹² The District Court recognized this. Its discussion of this part of Chapter 414 begins with the sentence: "The third part of the statute, the tax credit for tuition paid by parents to nonpublic schools, we think stands in different case." *Infra*, p. 32a.

one may not do by indirection what is forbidden directly; one may not by form alone contradict the substance of a transaction. (342 F. Supp. at 415)

We respectfully submit that this observation is no less applicable to the present case.

II. Severability

With practically no discussion, other than a citation of *Tilton v. Richardson, supra*, and *Champlin Refining Co. v. Corporation Commission*, 286 U.S. 200, 234 (1932), the District Court held that Section 3 of the Act is separable from Sections 1 and 2. We respectfully suggest that Judge Hays' response is far more persuasive. He states (*infra*, pp. 45a-46a):

The tax benefit statute was quite frankly enacted as a substitute for partial subsidies to parents who pay tuition to religious schools. It goes hand in hand with section 2. The benefits for section 3 parents begin at approximately the point where the grants to section 2 parents leave off.

As a matter of fact section 3 is so closely bound up with section 2 that the invalidity of section 3 follows from its relationship to section 2. If it is evident that the legislature would not have enacted the part of the statute that is claimed to be within its power independently of that which is not, the statute is wholly invalid, regardless of the inclusion of a separability clause. *Champlin Refining Co. v. Corporation Commission*, 286 U.S. 210, 234 (1932). It is obvious that the New York state legislature would not have enacted section 3 bene-

fitting the wealthier parents had they not intended it to be a complement to section 2 benefiting low income parents. Section 3 must therefore fall if section 2 is unconstitutional, as we have held it is.

We add only that holding Section 3 inseverable from Section 2 (and Section 1) does not make the severability clause superfluous. It serves the important and we submit intended purpose of preserving parts 4 and 5 of the Act, the need for which is obviously predicated on the invalidation rather than the upholding of the other parts.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this Court should note probable jurisdiction in the present case.

November 3,
Dated: ~~October 31~~, 1972

Respectfully submitted,

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Attorney for Appellants

APPENDICES

APPENDICES

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APPENDIX A

Opinion of the District Court

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

72 Civ. 2286

COMMITTEE FOR PUBLIC EDUCATION AND RELIGIOUS LIBERTY,
BERT ADAMS, BERNARD BACKER, ALGERNON D. BLACK,
THEODORE BROOKS, HERSCHEL CHANIN, NAOMI A. COWEN,
ROBERT B. ESSEX, FLORENCE FLAST, REBECCA GOLDBLUM,
BENJAMIN HAIBLUM, MARTHA LATIES, BLANCHE LEWIS,
ELLEN A. MEYER, EDWARD D. MOLDOVER, ARYEH NEIER,
DAVID SEELEY, ALBERT SHANKER, HOWARD M. SQUADRON,
and CHARLES H. SUMNER,

Plaintiffs,

—against—

EWALD B. NYQUIST, as Commissioner of Education of the
State of New York, ARTHUR LEVITT, as Comptroller of
the State of New York, and NORMAN GALLMAN, as Com-
missioner of Taxation and Finance of the State of
New York,

Defendants,

—and—

GERALDINE M. BOYLAN, PRISCILLA L. CHERRY, JOAN M.
DUCEY, NORA H. FERGUSON, ANGELINA M. FERRARELLA,
ERNEST E. ROOS, JR. and ADAMINA RUIZ,

Intervenor-Defendants,

—and—

SENATOR EARL W. BRYDGES, as Majority Leader and
President Pro Tem of the New York State Senate,

Intervenor-Defendant.

*Opinion of the District Court***Appearances:****LEO PFEFFER***Attorney for Plaintiffs*
New York, N. Y.**LOUIS J. LEFKOWITZ***Attorney General of the State of New York*
Attorney for Defendants
*Nyquist, Levitt and Gallman***By: RUTH KESSLER TOCH****JEAN M. COON,**
Of Counsel,
New York, N. Y.**DAVIS, POLK & WARDWELL***Attorneys for Intervenor-Defendants*
Boylan, Cherry, Ducey, Ferguson,
*Ferrarella, Roos and Ruiz***By: PORTER R. CHANDLER****RICHARD E. NOLAN,**
Of Counsel,
New York, N. Y.**JOHN F. HAGGERTY and****LOUIS P. CONTIGUGLIA***Attorneys for Intervenor-Defendant Brydges*
Senate Chamber
Albany, N. Y. 12224.**Before: HAYS, Circuit Judge, CANNELLA, District Judge**
and GURFEIN, District Judge.

Opinion of the District Court

GURFEIN, D.J.

We are again confronted with the question of the constitutionality of an Act of the New York Legislature relating to nonpublic schools, the children who attend them, and their parents. The plaintiffs are an unincorporated association and individuals who are residents of the State of New York and who pay income taxes and other taxes to that State. Some of the plaintiffs have children attending public schools. The defendants are the Commissioner of Education, the Comptroller and the Commissioner of Taxation and Finance of the State of New York.¹

Jurisdiction is alleged under United States Code, Title 28, Sections 1331, 1343(3), 2281, 2283, 2201 and 2202. The amount in controversy, exclusive of interest and costs, is alleged to be in excess of \$10,000.

By consent of all parties, a motion to convene a three-judge court pursuant to Title 28, Sections 2281 and 2283, was granted, and this Court was convened.

The plaintiffs seek to enjoin the defendants from approving or paying any funds or according tax benefits as provided in the Act to be described. The State seeks a dismissal of the complaint on the merits but asserts no jurisdictional bar to maintenance of the action.

Since no trial has been had, the attack upon the several parts of the Act assumes that they are each facially unconstitutional under the Establishment Clause of the First Amendment to the United States Constitution. The Act (N. Y. Laws of 1972, c. 414) is divided into five parts,

¹ Parents of children enrolled in nonpublic schools have been permitted to intervene as parties defendant. Similar permission was granted to Hon. Earl W. Brydges, Majority Leader and President *pro tempore* of the New York State Senate.

Opinion of the District Court

three of which are attacked by the plaintiffs as being in violation of the establishment clause which guarantees the separation of Church and State, as applied to the states by the Fourteenth Amendment.² These three parts of the statute which are under attack may be summarized as follows:

A. Section 1 provides for grants of money directly from the State Treasury to nonpublic schools for "maintenance" of the buildings if the nonpublic school has been designated during a base year as "serving a high concentration of pupils from low-income families for purposes of Title IV of the Federal Higher Education Act of 1965 (20 U.S.C.A. §425)." ³ If the school qualifies under the federal standard, it is to be given a direct grant of \$30 per pupil in attendance, which is increased to \$40 per pupil to those schools which are more than twenty-five years old.⁴ The grants, which are given directly to the particular nonpublic schools eligible for such grants, are to be in reimbursement of "maintenance and repair" costs incurred in the preceding year. "Maintenance and repair" is defined as "the provision of heat, light, water, ventilation and sanitary facili-

² The sections of the Act not under attack provide for impacted aid to public schools which have increased enrollment due to the closing of nonpublic schools, and provide for the purchase of nonpublic school buildings by public school districts where the nonpublic school has been closed (Sections 6-10).

³ 20 U.S.C. §425 deals with the partial forgiveness by the Federal Government of certain educational loans to students who become teachers in "a school in which there is a high concentration of students from low-income families," and provides a method for determining that criterion.

⁴ The amount of the grants is limited to "fifty per centum of the average per pupil cost of equivalent maintenance and repair in the public schools of the state on a state-wide basis, as determined by the commissioner."

Opinion of the District Court

ties, cleaning, janitorial and custodial services; snow removal; necessary upkeep and renovation of buildings, grounds and equipment; fire and accident protection; and such other items as the commissioner [the State Commissioner of Education] may deem necessary to ensure the health, welfare and safety of enrolled pupils." Each qualifying school which seeks an apportionment is required to submit to the Commissioner an application which shall include an audited statement of the expenditures of maintenance and repair of such qualifying school for the base year.

This part of the Act is entitled "Health and Safety Grants for Nonpublic School Children" and is prefaced by certain legislative findings. These recite that: (1) it is the primary responsibility of the state to ensure the health, welfare and safety of children attending both public and nonpublic schools; (2) "[f]inancial resources necessary to properly maintain and repair [deteriorating] buildings are beyond the capabilities of low-income people whose children attend nonpublic schools;" (3) teachers are given incentives by the Federal Government to teach in these poor areas; (4) healthy and safe nonpublic schools contribute to the stability of urban neighborhoods; and finally (5) "[t]o insure a healthy and safe school environment for children attending nonpublic schools, the state has the right to make grants for maintenance and repair expenditures which are clearly secular, neutral and non-ideological in nature."⁵

⁵ Because of the suggestion that it was essential for the State to know promptly whether it could disburse the funds as provided in Section 1, we announced in a *per curiam* opinion our holding that this Section was in violation of the First Amendment as applied to the states by the Fourteenth Amendment. This opinion elaborates that decision.

Opinion of the District Court

B. Section 2 of the Act provides for flat tuition grants from the State Treasury to parents with family incomes of less than \$5,000 per annum who have children attending elementary or secondary nonpublic schools. The grant is in the sum of \$50 a year for children in grades 1 through 8, and \$100 in grades 9 through 12. The tuition reimbursement cannot exceed 50% of the actual tuition payment made by the parent. The Commissioner is given "responsibility for the administration of the program" and is given authority to "promulgate such regulations as are necessary to carry out the provisions of this article." This section is entitled "Elementary and Secondary Education Opportunity Program."

Section 2 is prefaced by legislative findings that (1) "[t]he vitality of our pluralistic society is, in part, dependent upon the capacity of individual parents to select a school, other than public, for the education of their children"; (2) the Supreme Court of the United States has recognized this "right" of selection, but the "right" is diminished or denied to children of poor families whose parents have the least options in determining where their children are to be educated; (3) any precipitous decline in the number of nonpublic school pupils would cause a massive increase in public school enrollment and costs which would seriously jeopardize quality education for all children and aggravate an already serious fiscal crisis in public education; and (4) it is a legitimate purpose for the State to partially relieve the financial burdens of parents who provide a nonpublic education for their children.

C. Sections 3, 4 and 5 provide that an individual shall be entitled to subtract, for State income tax purposes, from

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his Federal adjusted gross income an amount shown in a table for his New York adjusted gross income, multiplied by the number of his dependents, not exceeding three, attending a nonprofit nonpublic school on a full time basis, provided that he has paid at least fifty dollars in tuition for each such dependent.* This exclusion may be taken only by parents with adjusted gross incomes of from \$5,000 to \$25,000 who do not receive a tuition assistance payment under Section 2. The exclusion would be as much as \$1,000 for each child, up to three children, enrolled in grades 1 through 12 with the net benefit to taxpayers apparently

* The table is as follows:

<i>If New York adjusted gross income is:</i>	<i>The amount allowable for each dependent is:</i>
Less than \$9,000	\$1,000
9,000-10,999	850
11,000-12,999	700
13,000-14,999	550
15,000-16,999	400
17,000-18,999	250
19,000-20,999	150
21,000-22,999	125
23,000-24,999	100
25,000 and over	-0-

Estimated Net Benefit to Family

<i>One Child</i>	<i>Two Children</i>	<i>Three or more</i>
\$50.00	\$100.00	\$150.00
42.50	85.00	127.50
42.00	84.00	126.00
38.50	77.00	115.50
32.00	64.00	96.00
22.50	45.00	67.50
15.00	30.00	45.00
13.75	27.50	41.25
12.00	24.00	36.00
-0-	-0-	-0-

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as shown in note 6, *supra*. The amount of income that may be excluded is reduced as the individual's adjusted gross income increases. The exclusion is deducted from adjusted gross income and is available to taxpayers whether they itemize or take the standard deduction.

This part of the Act is prefaced by legislative findings (§3) that (1) statutes already provide for the deduction from gross income for tax purposes of amounts contributed to religious, charitable and educational institutions; (2) nonpublic educational institutions are entitled to a tax exempt status by virtue of legislation which has been sustained by the courts; (3) by their existence, such educational institutions relieve the taxpayers of the State of the burden of providing public school education for the children who attend nonpublic schools; (4) tax laws also authorize deductions for education related to employment; and (5) similar modifications of Federal adjusted gross income should also be provided to parents for tuition paid to nonpublic schools.

We have stated the legislative findings offered in support of each part of the statute in detail because we wish to make it clear that we accept these findings, except where they purport to state principles of applicable constitutional law. They sum up legislative purposes which are cast as secular in intent. Thus, we must start with the assumption that the Legislature intended to preserve the health and safety of children who attend nonpublic schools in low-income areas. Similarly, we must start with the assumption that the Legislature intended to provide a quality education for all children who attend nonpublic schools in low-income areas. Similarly, we must start with the assumption

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that the Legislature intended to provide a quality education for all children and to nurture a pluralistic society by giving money from the State Treasury to poor parents for tuition in nonpublic schools. And lastly we must assume that taxpayers as a body have, indeed, been relieved up to now of the burden of providing public school education for the children who attend nonpublic schools.

In sum, we do not go behind the statements of the New York Legislature, although it is manifest that, regardless of the variety of secular arguments advanced to support the legislation, the prime legislative concern is to see that religious parochial schools do not go under for lack of financial support. If that is constitutionally permissible, it is a worthy objective and one that should not be lightly set aside in the alleged interest of public education. Both public and nonpublic education can exist side by side. Neutrality forbids discrimination in favor of one system over the other.

Whether the main reason for this *legislative* concern is the fear that an intolerable financial burden will be cast upon the public schools if the nonpublic schools do go under, or whether the main reason is the survival of religious education, is not the particular *judicial* concern. We must weigh not only the purpose of the legislation but its effect on the traditional separation of Church and State in this country. As to the former, we accept the legislative statements. As to effect, we must exercise the judicial function of interpreting what effect the legislation will have upon areas protected from invasion by the constitutional guaranty.

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This is, in essence, a conflict between two groups of extraordinary good will and civic responsibility. One group fears the diminution of parochial religious education which is thought to be an integral part of their rights to the free exercise of religion. The other group, equally dedicated, believes that encroachment of Government in aid of religion is as dangerous to the secular state as encroachment of Government to restrict religion would be to its free exercise. Since the policy of separating Church from State is not merely one of policy but of constitutional provision, the ultimate determination of such conflicts must rest in the judicial branch. And the judges must be especially careful in this delicate area not to allow their personal predilections on policy to circumscribe their judgment as to the constitutional effect of particular legislative proposals. We must make a constitutional decision between these two worthy objectives. Yet, as an inferior federal court, we are not permitted to view the religion clauses of the First Amendment in a literal or even in an historical fashion. We have only to determine their meaning as authoritatively expounded by the Supreme Court. We shall, therefore, discuss the constitutionality of each of the three parts of the statute under the guidelines laid down by the Supreme Court, as we understand them.

I

The findings of the Legislature in respect of the needs of parochial schools in low income areas must, as we have said, be accepted as fact. For us to delve into the reasons why parochial education is stratified by the boundaries of richer or poorer districts would be improper, for that would be

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trenching on the prerogatives of religious denominations which must determine their own priorities and administration without State interference under the Free Exercise Clause of the First Amendment, as well as under the negative implications of the Establishment Clause. It is not to be gainsaid that slum-area parochial schools do have financial troubles. The issue is whether it is constitutional for the State to maintain them. Of the estimated 280 schools in the low income areas, which the Legislature seeks to help, all or practically all, it was conceded upon the argument, are related to the Roman Catholic Church and teach Catholic religious doctrine to some degree. It is at this point that we must pause to review the history of the Establishment Clause in the courts in the light of the respective contentions of the parties.

The First Amendment of the United States Constitution, made applicable to the states by the Fourteenth Amendment (*Cantwell v. Connecticut*, 310 U.S. 296 (1940); *Murdock v. Pennsylvania*, 319 U.S. 105 (1943)), provides in part that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . ."

In *Everson v. Board of Education*, 330 U.S. 1, the Supreme Court was for the first time required to determine what was "an establishment of religion" in the First Amendment's conception (see *id.* at 29). It was there recognized by all the Justices that not simply an established church, but any law respecting an establishment of religion is forbidden and that schools teaching religion come within the scope of the clause prohibiting the "establishment of religion."¹ The precise issue in that case, upon which the

¹ *Id.* at 15 (Black, J.), see *Illinois ex rel. McCollum v. Board of Education*, 333 U.S. 203, 211 (1948).

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Court divided five to four, was the constitutionality of a New Jersey statute which allowed reimbursement of parents for the bus fares of children attending parochial schools as well as public schools; the particular provision was held constitutional. In view of the broad meaning attributed to the Establishment Clause by all the Justices, it is instructive to consider the limitations set upon their own decision by a majority of the Court. In the words of Mr. Justice Black for the majority, the "establishment of religion" clause "means at least this: . . . No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion." *Id.* at 15-16. Nor is the prohibition only against a tax *levy* to support religious teaching. It is also against *using* tax-raised funds for that purpose. Mr. Justice Black wrote: "New Jersey cannot consistently with the 'establishment of religion' clause of the First Amendment *contribute* tax-raised funds to the support of an institution which teaches the tenets and faith of any church" (emphasis added).

The majority of the Supreme Court did conclude, nevertheless, that the reimbursement of bus fares to parents was public welfare legislation, and that New Jersey could not be prohibited from extending its general state law benefits to all its citizens without regard to their religious beliefs. But the Court was careful to note in support of its decision that "[t]he State contributes no money to the schools. It does not support them." 330 U.S. at 18.

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The general language, however, did not remove the delicacy or the difficulty of the issues raised in succeeding cases. For we are a nation which recognizes value in religion but seeks to maintain neutrality in that sphere. Neutrality is not merely a state of mind, however. Neutrality inevitably means a relationship to religion, one way or another. And thus the Court formulated a two-fold test for sustaining legislation alleged to violate the Establishment Clause: There must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion. *School District v. Schempp*, 374 U.S. 203, 222 (1963). The Court recognized that this test "is not easy to apply," but that a law which "merely makes available to all children the benefits of a general [New York State] program to lend school books free of charge" is not in violation of the Establishment Clause. *Board of Education v. Allen*, 392 U.S. 236, 243 (1968). This decision brought forth three dissents, as well as a concurrence by Mr. Justice Harlan on the limited ground that the statute there involved "does not employ religion as its standard for action or inaction" *Id.* at 250.

The bifurcated test of intent and effect was again accepted in *Walz v. Tax Commission*, 397 U.S. 664, 669 (1970), a case to which we shall advert later. Furthermore, to the two tests was added a third, that the statute must not involve an "excessive entanglement" with religion. *Id.*

Yet, the issue of direct financial grant to parochial schools had not yet confronted the Court. Last year, such an issue was finally presented in the case of *Lemon v. Kurtzman*, 403 U.S. 602 (1971). This case is not only the most recent, but the most closely in point to the question of direct grants to primary and secondary parochial schools under Section 1

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of the statute before us, as is *Tilton v. Richardson*, 403 U.S. 672, decided the same day.

The *Lemon* case involved legislative grants as supplements to teachers' salaries in parochial schools in Pennsylvania and Rhode Island. The Rhode Island statute contained a legislative finding that the quality of education available in nonpublic elementary schools was jeopardized by the rising salaries needed to attract teachers, and authorized state officials to supplement the salaries of teachers of secular subjects in those schools by direct limited payment to the teacher, who was to teach only subjects taught in the public schools and no courses in religion. The Pennsylvania statute contained a legislative finding of rapidly rising costs in the State's nonpublic schools, and authorized reimbursement by the State to nonpublic schools of actual expenses for teachers' salaries, text books and instructional materials only in teaching secular subjects, and expressly excluded religious teaching.

Each statute, it will be seen, makes a distinction between that function of the parochial school which teaches secular subjects and that function which teaches religion, and stresses that state aid is not to be given for religious teaching. However, both the Pennsylvania and the Rhode Island statutes were struck down by the Supreme Court as violative of the Establishment Clause.

The opinion by the Chief Justice chose to hold the state legislation in violation of the Establishment Clause on the third of the three tests—excessive entanglement. This excessive entanglement was found to be of two kinds—administrative and political. The latter was based upon the prediction that continuing financial pressures on the

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nonpublic schools would, because of the annual nature of appropriations, generate considerable and recurring political activity to increase state aid, and that such activity would be along religious lines.

This choice of tests avoided the necessity to decide whether in *all* cases direct aid would be unconstitutional. But there is no indication, in our view, that the primary effect test, as a separate test, has been abandoned. And so far as precedent is concerned, the only direct aid to church-related institutions thus far sustained by the Supreme Court has been aid to hospitals, *Bradfield v. Roberts*, 175 U.S. 291 (1899) and the colleges in *Tilton*, where religious indoctrination was not a substantial purpose or activity of the church-related institutions. Nor was there any overruling in *Lemon* of various statements of the Justices that direct subsidy which aids schools with a religious mission would be unconstitutional. The striking down in *Tilton* of the provision inferentially permitting use of the buildings after twenty years for religious purposes, on the contrary, appears to bring such a subsidy within the primary effect test, without regard to the excessive entanglement test. *Tilton* is discussed more fully below.

While the opinions of the Justices who wrote separately supporting the result in *Lemon* differ in reasoning, the quintessence of what was held may, perhaps, be gleaned from the sole dissenting opinion, that of Mr. Justice White. 403 U.S. at 662. He stated the issue in the following terms: "Both the United States and the States urge that if parents choose to have their children receive instruction in the required secular subjects in a school where religion is also taught and a religious atmosphere may prevail, part or

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all of the cost of such secular instruction may be paid for by governmental grants to the religious institution conducting the school and seeking the grant. Those who challenge this position would bar official contributions to secular education where the family prefers the parochial to both the public and nonsectarian private school. The issue is fairly joined." Mr. Justice White relied strongly on the Free Exercise Clause to support his dissent, a view also urged upon us. But the rest of the Court refused to consider the conceded constitutional right of a parent to send his child to a parochial school as sufficient to sustain the public subsidy by the States in the face of the Establishment Clause. And Mr. Justice White himself made it clear that his dissent in the Rhode Island case was based upon findings of the District Court, which he maintained were ignored by the majority; and in the Pennsylvania case, he dissented only from the holding that the statute was *facially* unconstitutional.

It is important, because of the varied reasoning of the majority, to note what Mr. Justice White, as well, considered to be unconstitutional, and then to compare that formulation with the issue before us. Mr. Justice White explained:

"As a postscript I should note that both the federal and state cases are decided on specified Establishment Clause considerations, without reaching the questions that would be presented if the evidence in any of these cases showed that any of the involved schools restricted entry on racial or religious grounds or required all students gaining admission to receive instruction in

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the tenets of a particular faith. For myself, if such proof were made, the legislation would to that extent be unconstitutional." 403 U.S. 671 n.2.

In the case at bar, we are dealing largely with the same parochial school system that was before this Court in *Committee for Public Education and Religious Liberty v. Levitt and Nyquist*, 342 F. Supp. 439 (S.D.N.Y. April 27, 1972). The answers to interrogatories made there established that New York State construed as permissible beneficiaries schools which (a) impose religious restrictions on admissions; (b) require attendance of pupils at religious activities; (c) require obedience by students to the doctrines and dogmas of a particular faith; (d) require pupils to attend instruction in the theology or doctrine of a particular faith; (e) are an integral part of the religious mission of the church sponsoring it; (f) have as a substantial purpose the inculcation of religious values; (g) impose religious restrictions on faculty appointments; and (h) impose religious restrictions on what or how the faculty may teach. (Answer to Interrogatory 7) There seems to be no dispute that the statute here is also intended to apply to such schools.*

* The plurality opinion in *Tilton, infra*, by the Chief Justice makes it clear that the plurality were convinced that, with respect to the four colleges there involved, "religious indoctrination is not a substantial purpose or activity of these church-related colleges and universities." 403 U.S. at 687. On the other hand, aid to primary and secondary parochial schools is supported in New York on the very ground that parents have the right to choose parochial school education for their children as an important incident to their free exercise of religion, which includes the right to provide for religious indoctrination of the children through the parochial school.

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In *Tilton v. Richardson*, 403 U.S. 672 (1971), the Court held, five to four, that payments could be made under the Higher Education Facilities Act of 1963 to certain church-related *colleges* under one-time Federal construction grants for college facilities excluding "any *facility* used or to be used for sectarian instruction or as a place for religious worship or . . . primarily in connection with any part of the program of a school or department of divinity" (emphasis added). The Act permitted the Government to recover the funds granted within twenty years, if the restrictions on use of the building for religious teaching were not met. While sustaining the payments, the Court held unanimously that limiting the right of the Government to recapture the payment if the building should be used for religious purposes *after* twenty years was unconstitutional. It was accepted that the use of public funds for the construction of a building to be used for the teaching of religion was facially unconstitutional. Again, Mr. Justice White, while suggesting that the Court in *Tilton* was ruling that payments made directly to a religious institution are, without more, not forbidden by the First Amendment, 403 U.S. at 664, nevertheless concurred in the Court's invalidation of the provision whereby the restriction on the use for religious purposes of buildings constructed with Federal funds terminates after twenty years, 403 U.S. 665 n.1. The line drawn, it seems to us, is that while an entirely separate building of a church-related college, in no way related to the teaching of religion or the housing of worship, may receive public funds, it may not receive such funds from the moment when secular and religious teaching or prayer are mixed in the same building.

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Moreover, a direct grant to the parochial school is not the same as an across-the-board payment to parents of parochial school children which advances the common good as distinguished from religious good, and which equalizes the burden of the nonpublic school parent. The majority by Mr. Justice White in *Allen, supra*, pointed out the distinction: "Thus, no funds or books are furnished to parochial schools, and the financial benefit is to parents and children, not to schools." 392 U.S. at 243-44. Mr. Chief Justice Burger, in *Lemon*, noted that "the Pennsylvania statute, moreover, has the further defect of providing state financial aid directly to the church related schools." 403 U.S. at 621. He distinguished *Everson* and *Allen* on the very ground that there state aid was provided to the student and his parents—not to the church related school. And he noted that in *Walz* the Court had warned of the dangers of direct payments to religious organizations. *Id.*⁹

In Mr. Justice Brennan's view, "[g]eneral subsidies of religious activities would, of course, constitute impermissible state involvement with religion." *Walz v. Tax Commission, supra*, 397 U.S. at 690.

⁹ The impact of *Lemon* and *Tilton* on direct cash payments is suggested by two memorandum decisions filed on the same day. The Court vacated and remanded, for consideration in the light of *Lemon* and *Tilton*, *Kervick v. Clayton* and *Hunt v. McNair*, 403 U.S. 945 (1971). *Kervick* had upheld construction loans under the New Jersey Educational Facilities Authority Law, 56 N.J. 523, 267 A 2d 503 (1970). *Hunt* had upheld the issuance of bonds to pay off the indebtedness of a Baptist College under the Educational Facilities Authority Act, 255 S.C. 71, 177 S.E. 2d 362 (1970).

The Supreme Court of New Jersey, after the remand, held valid the statute which creates an Educational Facilities Authority to sell bonds and lend the proceeds to educational institutions, without

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This view is supported by history. The New York State Constitution provides in Article XI, §3:

“Neither the state nor any subdivision thereof shall use its property or credit or any public money, or authorize or permit either to be used, directly or indirectly, in aid or maintenance, other than for examination or inspection, of any school or institution of learning wholly or in part under the control or direction of any religious denomination, or in which any denominational tenet or doctrine is taught, but the legislature may provide for the transportation of children to and from any school or institution of learning.”

Fewer than a half-dozen states omit such a provision. See 403 U.S. 647, n.6. While the ultimate decision in the *Tilton* case prohibited a grant for construction of a building used for religious teaching (even after twenty years), the Constitution of New York itself prohibits the granting of such funds for “maintenance,” the very objective of Section 1 of the statute we are considering. While it is not our purpose to determine constitutionality under the New York Constitution—a matter reserved for the State courts

pledging the credit of the State. *Clayton v. Kervick*, 59 N.J. 583, 285 A. 2d 11 (1971). But it concluded that even with respect to loans, as distinguished from grants, a facility may not be used for sectarian instruction or as a place of religious worship even after repayment of the loans; and no college may participate if it restricts entry on racial or religious grounds or requires all students gaining admission to receive instruction in the tenets of a particular faith. *Id.* at 20-21.

The Supreme Court of South Carolina also upheld its loan statute which provided that the facilities involved shall not be used for sectarian instruction. *Hunt v. McNair*, 187 S.E. 2d 645, 652 (1972).

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—we cannot avoid being impressed, in our consideration of the guidelines of the Supreme Court, by the almost unanimous views of the states as expressed in their respective constitutions adopted by the people.

The argument is made, however, that since janitorial functions and snow removal obviously are not the teaching of religion, their neutral character permits a benevolent grant for these purposes from the tax raised funds in the State Treasury. The argument is bottomed on the assumption that a parochial school budget is divisible. It rejects the argument that once a public subsidy is given it lightens the burden on the rest of the budget and even permits more of the other private money to be used for religious instruction. Not having to pay the janitor makes it reasonable to assume that the money otherwise going to him can be used to increase the salary of a religious teacher or the fund for the purchase of objects of religious devotion. If it be argued that the subsidy would go only to the needy parochial school which has no surplus to apportion, the short answer is, of course, that such a parochial school would have more than it has now, for it does now pay from its present budget for janitor services and heat.¹⁰

¹⁰ The State urges upon us for consideration some language of Chief Justice Burger in *Tilton, supra*, to the effect that "[c]onstruction grants surely aid these institutions [the church-related colleges] in the sense that the construction of buildings will assist them to perform their various functions." 403 U.S. at 679. The State notes that this form of governmental assistance was upheld.

Taking it in its literal sense the argument from the language is a fair one. But the quoted language must be read in the light of the Chief Justice's actual holding that use of the buildings for religious purposes, even after twenty years, was unconstitutional.

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The vice, moreover, is not only that the school budget as such is indivisible, but that no effort is made in this part of the statute to distinguish between secular and religious education. The janitorial service embraces cleaning the chapel, where there is one, and heat is provided to the classrooms where religion is taught. There is no suggestion that heat is to be cut off while prayer or religious teaching is conducted in the same schoolroom. Cf. *Illinois ex rel. McCollum v. Board of Education*, 333 U.S. 203, 211 (1948).¹¹

Nor is the aid provided, though neutral in the sense of direct religious activity, given to any but a small class of institutions, almost all Roman Catholic, in deprived areas. It provides direct support for the maintenance of schools which teach religion.

Moreover, as Chief Justice Burger said in *Walz, supra*, "Obviously a direct money subsidy would be a relationship pregnant with involvement," 397 U.S. at 675. The "involvement" includes the inevitable auditing of reports of expenditures for maintenance and repair which surely must include the right of the State to determine the fairness of the charges made. The determination must be made

¹¹ The Supreme Court of Wisconsin recently held to be in violation of the Establishment Clause of the First Amendment a statute which authorized the contracting for purchase of dental education by the University [Marquette] dental school because it permitted the use of funds paid under the contract "in support of the operating costs" of the university without limiting the use of such funds exclusively to the providing of dental education in the dental school of the university. *State ex rel. Warren v. Busbaum* (State No. 266, July 7, 1972). This result was reached even though the Court recognized that the very nature of dental education assures the completely secular nature of the teaching of dentistry.

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whether the expenditures were, in fact, commensurate with the amount of the grant under the formula.

And the very percentage formula (\$30 or \$40 per pupil out of the entire tuition), honestly intended to avoid use of the subsidy for religious purposes, inevitably requires an assessment of how much of the education supplied is secular and how much religious. It is argued that the Legislature was careful to allow only fifty per cent of the actual costs of "maintenance and repair," as a maximum, and that this is assurance that the maintenance grant is not for religious teaching. But the very argument invites considerations of the percentage relationship of secular to religious teaching and the relative impact of religious indoctrination. The *Tilton* approach is not possible where the school to be benefited is not merely church-related but is itself part of the religious mission. If the Legislature is to be asked to determine formulas based on religious teaching *vel non*, it invites the very excessive entanglement we were instructed to avoid in the *Lemon* case.

If public subsidy for janitorial service and heat to needy nonpublic schools is allowed, we may ask whether the next step will not be to supply desks and blackboards and ultimately part of a building on a percentage basis, on the ground that these are not religious in character. Would it not then be argued that where a building is in serious disrepair it is better not to patch it up but to build a new building with public funds on the ground that such would be a health and welfare grant?

Nor is the argument based on the police power of the State convincing. Education is as much an important function within the police power of a State as are health and

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safety. See *Brown v. Board of Education*, 347 U.S. 483, 493 (1954). The conflict of the First Amendment with the police power has been made apparent in the constitutional decisions affecting educational activity by the states. Almost any legitimate activity, except the teaching or preaching of religion itself, can be said to be within some element of police power of the State. Yet, a State law enacted in the exercise of otherwise undoubted State power may not prevail against Federal law. See *Sears, Roebuck & Co. v. Stiffel Co.*, 376 U.S. 225, 229 (1964). State power, as we have been instructed, cannot, in this area, leap the constitutional barrier when it uses direct, special subsidy as the means to implement such power.

The political pressures on the Legislature are bound to be strong along religious lines. As the Chief Justice said in *Lemon*: "The potential for political divisiveness related to religious belief and practice is aggravated in these two statutory programs by the need for continuing annual appropriations and the likelihood of larger and larger demands as costs and populations grow." 403 U.S. at 623.¹²

To summarize our reluctant conclusion that we cannot sustain a direct public subsidy for the "maintenance and repair" of religious schools under the guidelines of the

¹² The brief of Senator Brydges argues that "[i]t is beyond the authority of the courts of the United States to dictate to the sovereign legislatures of the several states the parameters of its [sic] debates" (p. 37). We think that the Supreme Court, in its emphasis on "excessive entanglement" did not intend to limit legislative debate, but rather to strike down legislation which would encourage future divisive debate on religious lines. Whether this constitutional test should be modified is not within the province of this District Court. The argument can be made only to the Supreme Court.

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Supreme Court, our points of departure with the argument of the State of New York are that: (1) "No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to *teach* or practice religion." *Everson, supra*, 330 U.S. at 16 (emphasis added). We think *Tilton* does not overrule the application of the dictum to the case at bar. (2) The statute involved, though concentrating on schools in deprived areas, makes no distinction between secular and religious teaching, and tax-raised funds are directly used for the maintenance of buildings which teach religion. (3) We cannot accept the view that, under present doctrine, budgets for churches, synagogues or parochial schools can be made divisible by ascribing a percentage of cost to neutral functions. (4) On the contrary, we interpret the dictum of the Supreme Court that neutral services may be afforded to parochial schools to mean simply that general services, such as transportation, secular books, free lunches and, perhaps, athletic training, visiting nurses and the like, afforded to students in *all* schools may also be made available to students in parochial schools. (5) We think that, unlike the one-time construction of new buildings as in *Tilton*, the "maintenance and repair" provisions of the New York statute involve "continuing financial" and political "relationships [and] dependencies." *Tilton, supra*, 403 U.S. at 688.¹³

In sum, we hold that, although we accept the intention of the legislation as being essentially secular and within

¹³ It must be noted that the colleges involved in *Tilton* were not directly controlled by the church; the elementary and secondary schools covered by the New York statute are controlled by a religious hierarchy.

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the police power of the State, the effect of Section 1 of the statute in its present form is inevitably to advance religion. We hold, alternatively, that that Section creates a potentially excessive entanglement of the State with religion with potentially undesirable consequences to both.

II.

Section 2 of the statute provides for partial reimbursement to needy parents for the tuition they pay to send their children to parochial schools. Although the payment is to the parent, by hypothesis he is within a low annual income bracket (below \$5,000) which would make it possible that he could not afford to send his children to parochial school in the absence of a direct subsidy from the State Treasury. Indeed, it is the very assumption of the Legislature in its findings that he will use the money grant for tuition. Whether he gets it during the current year, or as reimbursement for the past year, is of no constitutional importance. The recipient is the parochial school. The source is the State tax-derived money. The parent is simply a conduit. See *Griffin v. County School Board*, 377 U.S. 218 (1964); *Griffin v. State Board of Education*, 239 F. Supp. 560, 563 (E.D. Va. 1965), *overruled on other grounds*, 296 F. Supp. 1178 (E.D. Va. 1969); *Wolman v. Essex*, 342 F. Supp. 399 (E.D. Ohio 1972).

While in the general distribution of a State aid program, as in the case of reimbursement of bus transportation to parents (*Everson, supra*), the loan of text books to students (*Allen, supra*), free lunches to children and the like, there is a distinction between a grant to the family and a grant to the parochial school, there is no such distinction

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where the parent is a mere conduit for a payment of tuition. In the former, the costs assumed by the State were generally borne by the parents, in the first instance, and it is they who are being reimbursed, not the school. In the case of tuition, it is the school which benefits by getting tuitions from State funds which it might otherwise not receive.¹⁴

The essential reliance of the State in support of this part of the statute is twofold: (1) that the free exercise of religion is inhibited if the needy may not be subsidized with State funds to aid their "right" to a parochial school education for their children; and (2) that the State will gain economic benefit from supporting parochial schools, because otherwise the fiscal burden cast upon the State in the event of their unfortunate demise will be almost intolerable.

¹⁴ Senator Brydges' brief argues as "history" (p. 16) that with respect to Section 3209 of the N.Y. Education Law, the New York Attorney General in 1935 ruled that it applied to children attending parochial schools as well as public schools. We agree that the affirmative duty of "public welfare officials" to furnish "indigent children with suitable clothing, shoes, books, food and other necessities to enable them to attend upon instruction as hereinbefore required by law" does not require the denial of these benefits to needy children who attend parochial schools. But there is nothing in that statute concerning the payment by the state of tuition for needy children. The Education Law involved a general grant to all which did not include tuition.

As to tuition, there may be situations where special circumstances make attendance at public schools impractical as in the case of orphan schools, see *Sargent v. Board of Education*, 177 N.Y. 317 (1904); Indian schools, Education Law, art. 83; and schools for deaf and blind children, *id.* art. 85. But those sections are not relevant to normal children who can attend the public schools.

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These are serious arguments that cannot be disregarded, particularly when made by a State Legislature, and we have given considerable thought to their meaning and implications, particularly in the light of our sympathy for the argument that in a pluralistic society it is a positive good to have a variety of educational institutions, not all public. As we have delved into the implications of these arguments we have become convinced, however, that, under our oath to defend the Constitution, we must hold that they fail.

The argument based on the Free Exercise Clause has a superficial appeal. Why should a richer man have the right to practice his religion as he sees fit while a poor man cannot do so only because of his poor financial condition? Are we not a nation that abhors distinctions based on wealth, and have we not strained the fisc to equalize the condition of rich and poor before the law? Indeed, we have left partisanship behind in our common belief that equality, so far as it is possible to achieve, is a desirable goal for our society.

The propagation of religious doctrine was early made the responsibility of the particular denomination in hard times as well as good times. We know, however, that inflation was no concern of the framers of the First Amendment, and, as individuals, we sympathize with its victims. But a State-supported church school is simply not a part of our way of life, and the payment of tuition for its pupils makes the church school a State-supported school.¹⁵

¹⁵ In the language of Chief Judge Lord* in *Lemon v. Sloan*, 340 F.Supp. 1356, 1364 (E.D. Pa. 1972): "The state cannot maintain that the Act has the purpose of promoting education by supporting nonpublic schools and then deny that the effect of the Act is to aid those schools."

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While there can be no proof either way, it is possible that among persons eligible for the tuition grant there will be not only those who now have their children in a parochial school but also some whose children now attend the public schools and whom they would transfer to a parochial school.

The implications of recognizing a "right" to the support of public funds for the expression of the free exercise of religion are, moreover, staggering. Religious belief and the right to practice religion, including the teaching of the young, are precious rights to be preserved unto death itself. But a subsidy to those who practice a particular religion to enable them to observe its tenets is not compatible with either clause of the First Amendment. If State subsidy may be given for religious education, why may it not be given to the poor for the purchase of sacramental wine, or a crucifix or a Torah, a printing press for Jehovah's Witnesses, or for a trip to a Baptist convention or to hear a favorite evangelist, or for a Muslim to take his pilgrimage to Mecca. These are all "rights" to the free exercise of religion that cannot be denied, and from the exercise of which the poor may be excluded by circumstance.

If the Founding Fathers had any intentions about religion, it was surely to separate the concern of the Government from the concern of the individual religious community. That is why we have the double-edged religion clauses of the First Amendment—no law respecting the establishment of religion *or* the free exercise thereof. Each sector must not only respect its own proper functions. Each must also support them. This appears to be the essence of the voluntarism requirement of the First Amend-

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ment; see Harlan, J., concurring in *Walz, supra*, 397 U.S. at 696.

The examples cited by the State to support its argument for tuition reimbursement to poor parents deal with the striking down of exactions by the State of money from the poor as a condition to their exercise of particular constitutional rights, like the right to sue in the courts for divorce without paying court costs, *Boddie v. Connecticut*, 401 U.S. 371 (1971), and the right to vote without paying a poll tax, *Harper v. Virginia Board of Elections*, 383 U.S. 663 (1966). So, too, *Sherbert v. Verner*, 374 U.S. 398 (1963) held invalid the denial of unemployment benefits where the free exercise of religion was inhibited. The statute here, on the contrary, affirmatively establishes benefits for the free exercise of religion. No case has been cited where an affirmative cash subsidy to advance the constitutional right to the free exercise of religion was allowed.

Nor do we ignore the argument forcefully put by the State and by representatives of the able majority leader of the State Senate. The possible closing of Catholic parochial schools on a large scale would cast a heavy burden on an already overburdened State. But we must recognize, within the guidelines set by the Supreme Court, that economic hardship alone is not enough to overcome the strictures of the First Amendment. The Court in *Lemon, supra*, accepted the legislative findings of economic stringency in the parochial schools, with the obvious, if not fully articulated, potential effect on the State finances of Rhode Island and Pennsylvania. It, nevertheless, struck down what were clearly economic measures to help the fiscal condition of

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the nonpublic schools with the possible consequence of forced absorption of their burdens by the States.

The argument, like many good arguments, stretches the band to the breaking point. For it must be tested for validity against contingencies which could occur and which would have a strong effect on legislative action, not only because of religious pressures on the legislators, but because of the conviction that the public treasury has more to gain by supporting church schools directly than by not supporting them.

If conditions worsen, it would be proper, under this argument, to pay the salaries of the secular teachers. But that is what has just been invalidated by the Supreme Court. The argument would logically admit of circumstances, honestly based upon economic need, which would support the grant of public funds, at least for secular education, in geographic areas where there were not enough parochial schools, and where the pressure of population would otherwise cause great hardship to the neighborhood public schools. Once we embark upon such a course, we fear that the meaning of the Establishment Clause will be diluted to the point where the State will support the parochial schools with the inevitable control by the State built into an anomalous situation. That is a condition devoutly not to be wished. The proponents of this legislation will probably affirm that they are willing to take their chances on such an eventuality and that they would rather have the funds in hand. But it is the peculiar function of the judicial branch to remain unmoved by current desires, not in the sense of usurping the province of legislatures, but

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in viewing basic constitutional provisions as outliving the generation of men which has to interpret them.¹⁶

III.

The third part of the statute, the tax credit for tuition paid by parents to nonpublic schools, we think stands in different case. In the first place, it is not restricted to areas which by concession are known to contain practically only Catholic parochial schools as in Part I. It covers attendance at *all* nonprofit private schools *in the State*. Second, it does not involve a subsidy or grant of money *from the State Treasury* as in Parts I and II. Third, it has a particular secular intent—one of equity—to give some recompense by way of tax relief to our citizens who bear their share of the burden of maintaining the public schools and who, because

¹⁶ (a) A similar conclusion was recently reached by a three-judge court in the Eastern District of Ohio. *Wolman v. Essex*, 342 F.Supp. 399 (E.D. Ohio 1972). There moneys had been appropriated for "educational grants to parents" and for the provision of neutral, non-religious "materials and services" for pupils attending nonpublic schools. The statute was held to be in violation of the Establishment Clause of the First Amendment.

(b) A Pennsylvania Act providing for reimbursement of tuition payments to parents whose children attend nonpublic schools was declared unconstitutional in spite of a legislative declaration that parents who send their children to nonpublic schools assist the State in reducing the rising cost of public education, and that if children now attending nonpublic schools were forced to transfer to public schools "an enormous added financial, educational and administrative burden would be placed upon the public schools and upon the taxpayers of the state." *Lemon v. Sloan*, *supra* at 1366 (three-judge court). Chief Judge Lord wrote: "If parents cannot afford to provide religious education for their children in sectarian schools without state aid, then by providing a program for aiding the parents, the state is plainly advancing religious education. The state has no more power to subsidize parents in providing a religious education for their child than it has to subsidize church-related schools to do so." *Id.* at 1365.

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of religious belief or otherwise, send their children to non-public full-time schools, as is their constitutional right. See *Pierce v. Society of Sisters*, 268 U.S. 510 (1925). Fourth, the benefit to the parochial schools, if any, is so remote as not to involve impermissible financial aid to church schools. Lastly, there is a minimum of administrative entanglement with the nonpublic schools. Nor is the on-going political activity as likely, in our opinion, to cause division on strictly religious lines.

We shall explain our reasons briefly.

There has always been a sharp distinction in the history of the United States between direct grants of public funds to religious institutions, generally prohibited, and tax exemption for religious institutions, generally permitted. This indirect aid to religious institutions has largely taken two forms, exemption from local property taxes and the like, and income tax exemptions for contributions to religious institutions. The former method was lately before the Supreme Court in *Walz, supra*. The latter method has never been challenged in the Supreme Court. As the Court noted in *Walz*, the real property tax exemption provision for churches is two hundred years old. The acquiescence in the practice by the people, the historical absence of religious divisiveness, and the exemption's ancient origin were considered to lend support to its exclusion from the restraints of the religion clauses of the First Amendment.

In *Walz*, the Court recognized that "[g]ranting tax exemptions to churches necessarily operates to afford an indirect economic benefit . . ." 397 U.S. at 674; yet the New York statute granting to churches as well as other educa-

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tional and civic institutions exemption from real property taxes was sustained. The Court also noted in *Walz* that "[t]he grant of a tax exemption is not sponsorship since the government does not transfer part of its revenues to churches but simply abstains from demanding that the church support the state." *Id.* at 675.

It certainly can be argued that if the power to tax is the power to destroy, the power not to tax is the power to support. The Supreme Court has not accepted that view, and has rejected the argument that exemptions do not differ from subsidies as a matter of economics.

Our distinguished colleague, Judge Hays, in his dissenting opinion assumes constitutional invalidity because the "purpose and effect of the statute [Part III] are . . . to subsidize religious training for children." Why, then, it may be asked, does not an income tax deduction for a contribution to a church "subsidize" religious worship for parents? If, indeed, "there is no essential difference between a parent's receiving a \$50 reimbursement for tuition paid to a parochial school and his receiving a \$50 benefit because he sends his child to a parochial school," then there should be no essential difference between a parent's receiving a \$50 "reimbursement" for a payment to his parish church and his receiving a \$50 "benefit" for the same payment. As Judge Hays states it, "in both instances the money involved represents a charge made upon the state for the purpose of religious education." With great respect, we paraphrase this to say that, in our illustration as well, it could be said that the money involved represents a charge made upon the State for the purpose of denominational worship. Yet we

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have abided this very condition in our taxing system for many years, although we know that some denominations conduct church-related Sunday Schools or even weekday afternoon classes in religion.

Whether the distinction is based on logic, history or simply on an authoritative guideline set by the Supreme Court, we may approach our difficult task with the distinction between subsidy and tax exemption in mind. It cannot be a perfect guide, for the statute involved in *Walz* gave real property tax exemption to a great many institutions, not only churches, there was no question of arbitrary classification, and alleged State involvement with religion was at least equivocal. On the other hand, in favor of its validity is the circumstance that under Section 3 of our statute, the income tax exemption (which is in effect a tax *credit* since the exemption is not intended to equal the parents' outlay) is to *individuals*, not to churches or church schools, a step removed. This kind of income tax relief, while not as old as property tax exemption because the constitutional income tax law itself is relatively modern, has been on the Federal statute books for more than half a century. It has been a consistent legislative policy ever since the 1917 Revenue Act for the Congress to permit the deduction of so-called charitable contributions from personal income.¹⁷ This has always included direct gifts to churches. The purpose is no doubt to encourage such contributions. 5 J. Mertens,

¹⁷ Revenue Act of 1917, c. 63, §1201(2), 40 Stat. 331. That statute allowed as a deduction, "[c]ontributions . . . made to corporations or associations organized and operated exclusively for religious, charitable, scientific or educational purposes."

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Law of Federal Income Taxation §31.01 (1969); *Bliss v. Commissioner*, 68 F. 2d 890 (2 Cir. 1934), *aff'd*, 293 U.S. 144 (1934).

We think that, aside from the "equal protection" problem which we do not pass upon, the credit against gross income of a fixed amount if tuition is paid to nonpublic schools, does not sponsor, or render forbidden financial support to church schools, at least in the limited form in which relief is given here. Credit is allowed not only to parents who pay tuition to a religious school but also to any nonprofit, nonpublic secular school. The table in the statute is geared roughly to the tax brackets and the rate of tax imposed on each bracket. The result ranges from a small, almost token, forgiveness to a family which attains an adjusted gross income of almost \$25,000 to a forgiveness roughly approximating the tuition cost of \$50 per child for a family in the lowest bracket. A memorandum prepared by Senator Brydges indicates that a family with three children in a nonpublic school would get a net benefit annually ranging from \$150 if the family has an adjusted gross income of less than \$9,000, to \$36 if the family has an adjusted gross income of \$24,999. The benefit is inverse to income. And we believe the Legislature has power to decide between allowing deductions and allowing credits.¹⁸

It seems to us unlikely, at least in the absence of strong proof, that a person having \$6,000 to \$9,000 per annum as an adjusted gross income would take his forgiveness or windfall, and hand it back to the parochial school as addi-

¹⁸ A deduction of \$150 for a person in a 6% tax bracket (\$7,000 to \$9,000) would have given him only a nine dollar benefit.

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tional tuition. He would, more likely, compensate himself for the tuition paid in an amount which would otherwise have gone to the State for income taxes. Thus, it is likely that while the State loses revenue, as it does generally in allowing charitable deductions, it does not aid the parochial school, as it may, indeed, do when it allows deductions for direct contributions to the church. If, in fact, persons in a somewhat higher bracket should forego the forgiveness and turn over the tax saving to the church, that would be a voluntary act, not different in kind from an ordinary church contribution. Indeed, it is to be hoped that at least part of the costs of educating poor children will come from this source.

Once we have hurdled the constitutional barrier to income tax benefit for contributions directly made to churches, as we believe we must, there is not much further to travel. It is true that the argument may be advanced as the dissenting opinion does that the parent receives a consideration in the education of his child, while there is no *quid pro quo* in a contribution to a church. And we understand that the Federal tax authorities do scrutinize contributions of parochial school parents with that yardstick. See *Fausner v. Commissioner*, 55 T.C. 620 (1971).

We are not dealing, however, with the interpretation of a revenue act but with an inquiry upon the limitations of the power of a State Legislature under the Federal Constitution. As a Court, we may not pass on questions of religious values or even adumbrate the moral or religious "consideration" that may accrue to the donor of a gift to the church of his choice.

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We put it more simply in practical terms. If a parishioner made a contribution to his parish, and the parish school were entirely free of tuition, would he be denied his income tax deduction because his child attended that school? Opinions may differ on the interpretation of present statutes, but it seems to us likely that an affirmative formulation by the Legislature would be constitutional.

We have not been asked to pass upon the constitutionality of part three on "equal protection" grounds, and we do not do so, cf. *Everson, supra*, 330 U.S. at 4-5." Putting such argument to one side, we think that the pressure on legislators to amend the income tax law is likely to be more from nonpublic school parents as a group rather than from parents of a single religious denomination. The principles of equity rather than of religious aid will probably be put to the fore if further liberalization by the Legislature is sought. And that we believe would not make for an inevitable excessive entanglement with religion in the legislative halls. As to administrative entanglement under part three of the statute, we see none beyond checking with the school simply to determine whether the tuition claimed to have been paid was actually paid.

We note, moreover, that the secular purpose as well as its effect is strong. The lightening of the tax burden of those who contribute to public education while deriving no benefit from it for themselves, albeit theirs is a voluntary

¹⁰ There the Court refused to consider whether the apparent exclusion of "private schools run for profit" violates the Equal Protection Clause of the Fourteenth Amendment, because the statute was not challenged on that ground.

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choice, is a legitimate legislative purpose. In effect, it is no different from giving some exemption from school tax to childless couples or the aged who no longer have children of school age. The Legislature certainly has a broad power to classify in a tax statute. 1 J. Mertens, *supra*, §4.09. As we have said, however, we do not now deal with the "equal protection" argument, the reasonableness of the classification by those standards, or whether there is an appropriate governmental interest suitably furthered by the different treatment. See *Police Department v. Mosley*, — U.S. —, 92 S. Ct. 2286 (1972).

We hold only that Section 3 of the statute is not in conflict with the First Amendment Establishment Clause, as applied to the states through the Fourteenth Amendment.

We also find Section 3 of the statute separable from the parts found to be unconstitutional. The statute itself contains a separability clause (§11). And we are not required to invalidate the entire Act. See *Tilton, supra*, 403 U.S. at 683-84; *Champlin Refining Co. v. Corporation Commission*, 286 U.S. 210, 234 (1932).

A permanent injunction will be issued against the enforcement of Sections 1 and 2 of the statute. Judgment will be entered accordingly, pursuant to Fed. R. Civ. P. 54(b). The Court expressly determines that there is no just reason for delay. A permanent injunction against enforcement of Section 3 of the statute will be denied. The complaint so far as it relates to Section 3 of the statute, will not be dismissed, however. The parties may move for summary judgment or for an expedited trial.

An order will be settled on notice.

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The foregoing shall constitute the Court's findings of fact and conclusions of law pursuant to Fed. R. Civ. P. 52(a).

Dated: October 2, 1972.

PAUL R. HAYS, *U. S. C. J.*
(Dissenting in part)

JOHN M. CANNELLA, *U. S. D. J.*
MURRAY I. GURFEIN, *U. S. D. J.*

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HAYS, *Circuit Judge*, in part concurring in the result; dissenting in part:

I am in agreement with the view of my colleagues that the part of the state statute (N.Y. Laws of 1972, c.414) providing for grants to private schools for the maintenance of buildings cannot survive a challenge based on the Establishment Clause and the cases decided under it. *Tilton v. Richardson*, 403 U.S. 672 (1971); *Lemon v. Kurtzman*, 403 U.S. 602 (1971); *Walz v. Tax Comm'n*, 397 U.S. 664 (1970); *Bd. of Education v. Allen*, 392 U.S. 236 (1968); *Everson v. Bd. of Education*, 330 U.S. 1 (1947). I agree with Judge Gurfein's view that the part of the statute providing for flat tuition grants to low-income parents is also unconstitutional. In addition to the cases previously cited see also *Wolman v. Essex*, 342 F. Supp. 399 (E.D. Ohio, 1972) (three judge court); *Lemon v. Sloan*, 340 F. Supp. 1356 (E.D. Pa., 1972) (three judge court). I therefore concur in the result reached by Judge Gurfein as to these aspects of the statute.

I dissent from the court's judgment concerning section 3 of the state act. I believe that that section, which provides for tax benefits with respect to tuition paid by the taxpayer for children attending religious schools, is also unconstitutional.

The purpose and effect of this provision of the statute are the same as the second portion, i.e., to subsidize religious training for children.¹ Both sections aim to reimburse

¹ Although section 3 is made applicable to parents whose children attend *any* nonprofit nonpublic school, the overwhelming majority of these parents are sending their children to religious schools where sectarian indoctrination takes place. According to the

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parents who have chosen to send their children to religious schools. As Mr. Justice Jackson said:

"The prohibition against establishment of religion cannot be circumvented by a subsidy, bonus, or reimbursement of expense to individuals for receiving religious instruction and indoctrination." *Everson v. Bd. of Education*, 330 U.S. at 24 (Jackson, J. dissenting).

And "[w]hat may not be done directly may not be done indirectly lest the Establishment Clause become a mockery." *Abington School District v. Schempp*, 374 U.S. 203, 230 (Douglas, J. concurring).²

The benefits of the tax exemption allowed by section 3 are of the same nature as those accorded under the tuition reimbursement provisions of section 2. There is no essen-

Fleischman Commission report, religious schools make up 93.5% of New York State's *nonpublic* schools. The remaining 6.5% consist of both profit-making and nonprofit-making private schools. Report on Nonpublic Education in the State of New York for the New York State Commission on the Quality and Financing of Elementary and Secondary Education, "The Collapse of Nonpublic Education: Rumor or Reality?," Vol. 1, pp. 1-6. See Transcript in *Pearl v. Nyquist*, p. 64. The profit-making schools are not, of course, covered by section 3.

² In the context of racial discrimination, grants to schools, students or their parents to avoid the commands of the Fourteenth Amendment have been consistently struck down. See *Griffin v. School Bd. of Prince Edward County*, 377 U.S. 218 (1964); *Hall v. St. Helena Parish School Bd.*, 197 F. Supp. 649 (E.D. La., 1961), *aff'd*, 368 U.S. 515 (1962); *Lee v. Macon County Bd.*, 267 F. Supp. 458 (M.D. Ala., 1967), *aff'd sub nom. Wallace v. United States*, 389 U.S. 215 (1967); *Brown v. South Carolina State Bd.*, 96 F. Supp. 199 (D.S.C., 1968), *aff'd*, 393 U.S. 222 (1968); *Coffey v. State Educ. Finance Comm'n*, 296 F. Supp. 1389 (S.D. Miss., 1969).

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tial difference between a parent's receiving a \$50 reimbursement for tuition paid to a parochial school and his receiving a \$50 benefit because he sends his child to a parochial school. In both instances the money involved represents a charge made upon the state for the purpose of religious education.

The exemption of church property from ordinary taxation provides no analogy for the tax benefits of the present statute. The schools in the nonprofit nonpublic category in New York State are tax-exempt, N.Y. Real Prop. Tax Law §421 (1) (a) (McKinney Supp. 1971), and that status is not in dispute in this case. In *Walz v. Tax Commission*, supra, the Court believed nearly two centuries of acquiescence in and approval of such exemptions lent support to the proposition that the exemptions did not violate the Establishment Clause. 397 U.S. at 680. Moreover, the Court noted in *Walz* that the State had not "singled out one particular church or religious group or even churches as such; rather it [had] granted exemption to all houses of worship within a broad class of property owned by non-profit, quasi-public corporations" *Id.* at 673. Here, as the three judge panel pointed out in *Wolman v. Essex*, supra, "[t]he limited nature of the class affected by the legislation, and the fact that one religious group so predominates within the class, makes suspect the constitutional validity of the statute." 342 F. Supp. at 412. Finally, the *Walz* court held (p. 674) that:

"Elimination of exemption would tend to expand the involvement of government by giving rise to tax valuation of church property, tax liens, tax foreclosures, and the direct confrontations and conflicts that follow in the train of those legal processes."

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The *Walz* decision, as the Court said in *Lemon v. Kurtzman*, supra, p. 614, "tended to confine rather than enlarge the area of permissible state involvement with religious institutions"

Nor does the present case concern the tax deductibility of religious contributions. Such contributions, even to church schools, are deductible under New York law, N.Y. Tax Law §360(10b) (McKinney 1966), and they would not be affected by the statute under scrutiny. Even assuming that tax deductions for contributions to religious schools are constitutional—a point not yet passed upon by the Supreme Court—we are not dealing with such deductions in the present case. A payment for services rendered is not a contribution, and such payments are not deductible. As the court said in *DeJong v. Commissioner*, 36 T.C. 896, 899-900 (1961), aff'd 309 F.2d 373 (9th Cir. 1962):

"We are satisfied on the record before us that at least a portion of the \$1,075 paid by petitioners to the society was in the nature of tuition fees for the education which the society was expected to furnish to petitioners' children and was not in fact a true charitable contribution. Payments pledged and made by parents in the circumstances disclosed by the evidence were not voluntary and gratuitous contributions motivated merely by the satisfaction which flows from the performance of a generous act; they were induced, at least in substantial part, by the benefits which the parents sought and anticipated from the enrollment of their children as students in the society's school."

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See also *McLaughlin v. Commissioner*, 51 T.C. 233 (1968);
Tausner v. Commissioner, 55 T.C. 620 (1971).

The tax benefit statute was quite frankly enacted as a substitute for partial subsidies to parents who pay tuition to religious schools. It goes hand in hand with section 2. The benefits for section 3 parents begin at approximately the point where the grants to section 2 parents leave off.^a

As a matter of fact section 3 is so closely bound up with section 2 that the invalidity of section 3 follows from its relationship to section 2. If it is evident that the legislature could not have enacted the part of the statute that is claimed to be within its power independently of that which is not, the statute is wholly invalid, regardless of the inclusion of a separability clause. *Champlin Refining Co. v. Corporation Commission*, 286 U.S. 210, 234 (1932). It is obvious that the New York state legislature would not have

^aThe following table shows the estimated net benefits to taxpayers under section 3. The information is taken from the memorandum which accompanied the bill. It was submitted to each legislator by Senator Brydges and was cited by the majority of the p.

If Adjusted Gross Income is	Income Exclusion Per Pupil is	Estimated Net Benefit to Family		
		One child	Two children	Three or more
less than \$ 9,000	\$1,000	\$50.00	\$100.00	\$150.00
\$ 9,000 - 10,999	850	42.50	85.00	127.50
11,000 - 12,999	700	42.00	84.00	126.00
13,000 - 14,999	550	38.50	77.00	115.50
15,000 - 16,999	400	32.00	64.00	96.00
17,000 - 18,999	250	22.50	45.00	67.50
19,000 - 20,999	150	15.00	30.00	45.00
21,000 - 22,999	125	13.75	27.50	41.25
23,000 - 24,999	100	12.00	24.00	36.00
25,000 and over	0	0	0	0

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enacted section 3 benefiting the wealthier parents had they not intended it to be a complement to section 2 benefiting low income parents. Section 3 must therefore fall if section 2 is unconstitutional, as we have held it is.

For the foregoing reasons I respectfully dissent from the determination of the court as to the constitutionality of section 3.

APPENDIX B

Session Laws of New York

Education—Nonpublic Schools—Aid

CHAPTER 414

An Act to amend the education law, in relation to health, welfare and safety grants for pupils in nonpublic schools; to establish an elementary and secondary education opportunity program of tuition reimbursement for parents of low income; to amend the tax law, in relation to a modification of federal adjusted gross income for parents of nonpublic school children; and to amend the education law, in relation to impacted aid for school districts and the purchase of existing structures to be used for school buildings.

Approved May 22, 1972, effective as provided in section 12.

Passed on message of necessity. See Const. art. IX, § 2(b) (2), and McKinney's Legislative Law § 44.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. The education law is hereby amended by adding thereto a new article, to be article twelve, to read as follows:

ARTICLE 12—HEALTH AND SAFETY GRANTS FOR
NONPUBLIC SCHOOL CHILDREN

Section

549. Legislative findings.

550. Definitions.

551. Apportionment.

552. Applications, reports, regulations.

553. Installments.

§ 549. Legislative findings

The legislature hereby finds and declares that:

1. The state has a primary responsibility to ensure the health, welfare and safety of children attending both public and nonpublic schools.

2. The state discharges this responsibility to public school children through substantial amounts of per pupil financial assistance to local school districts. The fiscal crisis in nonpublic education, however, has caused a diminution of proper maintenance and repair programs, threatening the health, welfare and safety of nonpublic school children, particularly in urban areas. Such areas are generally identified by a high incidence of families receiving assistance to dependent children and deteriorating physical structures, including nonpublic school buildings. Financial resources necessary to properly maintain and repair such buildings are beyond the capabilities of low-income people whose children attend nonpublic schools.

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Session Laws of New York

3. In recognition of the financial plight of urban areas in attracting qualified teachers, the federal government has enacted Title IV of the Higher Education Act of nineteen hundred sixty-five,¹ which provides incentives to teachers to instruct in those schools which serve a high concentration of students from low-income families.

4. It is incumbent upon the state to ensure that the physical environment in such Title IV areas is both healthy and safe. Incidental to such goals, but none the less significant, is the contribution that a healthy and safe school environment makes to the stability of urban neighborhoods.

5. To insure a healthy and safe school environment for children attending nonpublic schools, the state has the right to make grants for maintenance and repair expenditures which are clearly secular, neutral and non-ideological in nature.

¹ 20 U.S.C.A. § 1061 et seq.

§ 550. Definitions

In this article:

1. "Commissioner" shall mean the state commissioner of education.

2. "Qualifying school" shall mean a nonprofit elementary or secondary school in the state of New York, other than a public school, which (a) is providing instruction in accordance with article seventeen and section thirty-two hundred four of this chapter, (b) has not been found to be in violation of Title VI of the Civil Rights Act of nineteen hundred sixty-four, 78 Stat. 252, 42 U.S.C. § 2000(d),¹ (c) which is entitled to a tax exemption under section five hundred one (a) and five hundred one (c) (3) of the Federal Internal Revenue Code of nineteen hundred fifty-four,² as amended, and (d) has been designated during the base year as serving a high concentration of pupils from low-income families for purposes of Title IV of the Federal Higher Education Act of nineteen hundred sixty-five (20 U.S.C.A. § 425).

3. "Base year" shall mean the school year immediately preceding the current year.

4. "Current year" shall mean the school year during which an apportionment is to be paid pursuant to this article.

5. "Health, welfare and safety grants" shall mean the apportionment made pursuant to this article which shall be used for the maintenance and repair of nonpublic school facilities and equipment to ensure the health, welfare and safety of enrolled pupils.

6. "Maintenance and repair" shall mean the provision of heat, light, water, ventilation and sanitary facilities; cleaning, janitorial and custodial services; snow removal; necessary upkeep and renovation of buildings, grounds and equipment; fire and accident protection; and such other items as the commissioner may deem necessary to ensure the health, welfare and safety of enrolled pupils.

7. "Average daily attendance" shall mean the total number of attendance days of enrolled pupils in grades one through twelve during the base year, divided by the number of days the school was in session.

*Session Laws of New York***§ 551. Apportionment**

1. In order to meet proper health, welfare and safety standards in qualifying schools for the benefit of the pupils enrolled therein, there shall be apportioned health, welfare and safety grants by the commissioner to each qualifying school for the school years beginning on and after July first, nineteen hundred seventy-one, an amount equal to the product of thirty dollars multiplied by the average daily attendance of pupils receiving instruction in such school, to be applied for costs of maintenance and repair. Such apportionment shall be increased by ten dollars multiplied by the average daily attendance of pupils receiving instruction in a school building constructed prior to nineteen hundred forty-seven. In no event shall the per pupil annual allowance computed under this section exceed fifty per centum of the average per pupil cost of equivalent maintenance and repair in the public schools of the state on a state-wide basis, as determined by the commissioner, and in no event shall the apportionment to a qualifying school exceed the amount of expenditures for maintenance and repair of such school as reported pursuant to section five hundred fifty-two of this article.

2. The apportionment pursuant to this section shall be reduced by one one hundred eightieth for each day less than one hundred eighty days that such school was actually in total session in the base year, except that the commissioner may disregard such reduction up to five days if he finds that the school was not in session for one hundred eighty days because of extraordinary adverse weather conditions, impairment of heating facilities, insufficiency of water supply, shortage of fuel or the destruction of a school building, and if the commissioner further finds that such school cannot make up such days of instruction during the school year. No such reduction shall be made, however, for any day on which such school was in session for the purpose of administering the regents examinations or the regents scholarship examinations, or any day, not to exceed three days, when such school was not in session because of a conference of teachers called by the principal of the school.

§ 552. Applications, reports, regulations

Each qualifying school which seeks an apportionment pursuant to this article shall submit to the commissioner an application therefor, at such times, in such form and containing such information as the commissioner may by regulation prescribe in order to carry out the purposes of this article. Such applications shall include an audited statement of the expenditures of maintenance and repair of such qualifying school for the base year.

§ 553. Installments

The amount to be apportioned to a qualifying school in any current year shall be paid in two equal installments, the first to be made on or before January fifteenth and the other not later than June fifteenth of each year, except that for the school year commencing July first,

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payment on or before June fifteenth, nineteen hundred seventy-two. The commissioner may provide for later payments for the purpose of adjusting and correcting apportionments. The amount to be apportioned to a qualifying school shall be payable on order and warrant of the comptroller on vouchers certified or approved by the commissioner in the manner provided by law.

§ 2. Such law is hereby amended by inserting therein a new article, to be article twelve-A, to read as follows:

ARTICLE 12-A—ELEMENTARY AND SECONDARY
EDUCATION OPPORTUNITY PROGRAM

Section

559. Legislative findings.

560. Short title.

561. Definitions.

562. Tuition reimbursement payments to parents.

563. Commissioner; powers.

§ 559. Legislative findings

The legislature hereby finds and declares that:

1. The vitality of our pluralistic society is, in part, dependent upon the capacity of individual parents to select a school, other than public, for the education of their children. A healthy competitive and diverse alternative to public education is not only desirable but indeed vital to a state and nation that have continually reaffirmed the value of individual differences.

2. The Supreme Court of the United States has recognized and reaffirmed this right of selection. This right, however, is diminished or even denied to children of lower-income families, whose parents, of all groups, have the least options in determining where their children are to be educated.

3. Quality education is made possible for all children in our state only because the burden of providing it has been carried by taxpayers who support both public and nonpublic education. Any precipitous decline in the number of nonpublic school pupils would cause a massive increase in public school enrollment and costs. Such an increase would seriously jeopardize quality education for all children and aggravate an already serious fiscal crisis in public education.

4. In recognition of the initiative of parents who support both public and nonpublic education, it is a legitimate purpose for the state to partially relieve the financial burden of parents who provide a nonpublic education for their children which satisfies the compulsory education laws of the state. Such assistance is clearly secular, neutral and nonideological in nature and is consistent with the historical and continuing role of the state in providing a quality education for all children and in nurturing a pluralistic society.

5. An Elementary and Secondary Education Opportunity Program is hereby established, which consists of tuition reimbursement for par-

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the financial burden of supporting the compulsory education of their children who are full-time students in New York nonpublic elementary and secondary schools.

§ 560. Short title

This article shall be known as the "Elementary and Secondary Education Opportunity Program".

§ 561. Definitions

The following terms, whenever used in this article, shall have the following meanings:

a. "Parent" means a legal resident of the state of New York with a New York taxable income of under five thousand dollars who is a parent, stepparent, adoptive parent and the spouse of an adoptive parent of a pupil enrolled in a nonpublic school, or a resident with such taxable income standing in loco parentis to such pupil.

b. "Taxable income" means the amount of combined net taxable income, if any, of both parents computed in accordance with the provisions of section six hundred eleven of the tax law computed without the benefit of the modification of federal adjusted gross income for nonpublic school tuition pursuant to paragraph (14) of subsection (c) of section six hundred twelve of the tax law, for the year for which a tuition reimbursement payment is sought. If the parents of a pupil are living apart, the taxable income of the parent who claims reimbursement under this article shall be based upon the taxable income of that parent with whom the pupil is living, or who exercises custody if the pupil is a minor, or would exercise custody if the applicant were a minor and any appropriate payments for the support of the pupil from the other parent.

c. "Nonpublic school" means any nonprofit elementary or secondary school in the State of New York, other than a public school, which (i) is providing instruction in accordance with article seventeen and section thirty-two hundred four of this chapter, (ii) has not been found to be in violation of Title VI Civil Rights Act of 1964, 78 Stat. 252, 42 U.S.C. § 2000(d),¹ and (iii) which is entitled to a tax exemption under section five hundred one (a) and five hundred one (c) (3) of the Federal Internal Revenue Code of nineteen hundred fifty-four,² as amended.

d. "Tuition" means the amount actually paid by a parent for the enrollment of a pupil at a nonpublic school for the calendar year for which a tuition reimbursement payment is sought.

e. "Pupil" means a resident of the state of New York who has been enrolled full-time in a nonpublic school and whose parents' combined taxable income is less than five thousand dollars.

f. "Commissioner" means the commissioner of education of the State of New York.

g. "Regular school year" means all of the months of the calendar exclusive of July and August.

*Session Laws of New York***§ 562. Tuition reimbursement payments to parents**

1. Upon the filing by a parent of the verified statement as required by subdivision two, the commissioner shall make a tuition reimbursement payment to such parent for tuition expenses made in the preceding calendar year. Only one such payment shall be made on behalf of any pupil in a calendar year. Such payment shall be the lesser of either (a) fifty percent of the tuition paid by the parent during the preceding calendar year for the elementary or secondary education of each pupil, or (b) five dollars per month for the period of enrollment in a nonpublic school during the regular school year for each pupil in grades one through eight, and ten dollars per month for the period of enrollment in a nonpublic school during the preceding regular school year for each pupil in grades nine through twelve. Whenever payments as herein computed total less than ten dollars, no such payment shall be made.

2. In order to be eligible for tuition reimbursement hereunder, the parent of a pupil shall, by May first of the year following the calendar year for which reimbursement is sought, file with the commissioner a verified statement, in such form as he shall provide, stating that the pupil was enrolled during such year in a nonpublic school or schools and, in addition, the following information: (a) the name, address and taxable income of the parent; (b) the name, address and birth date of the pupil; (c) the grade in which the pupil was enrolled during each month in a nonpublic school in such year; (d) the name and address of the nonpublic school or schools attended by such pupil; (e) a receipted tuition bill. For reimbursement for the calendar year nineteen hundred seventy-one, such verified statement shall be filed not later than July first, nineteen hundred seventy-two.

3. No parent shall be eligible to receive a tuition reimbursement payment who has claimed a modification of federal adjusted gross income for nonpublic school tuition pursuant to paragraph fourteen of subsection (c) of section six hundred twelve of the tax law based upon the same tuition expenditures.

4. The state tax commission shall, when requested by the commissioner, compare any verified statement filed with the commissioner pursuant to this article with the state income tax returns if any, filed by the parent making such verified statement and shall report any discrepancies to the commissioner. All verified statements filed with the commissioner and all reports made to him by the state tax commission, pursuant to this article shall be deemed confidential and, except in accordance with proper judicial order or as otherwise prescribed by law, it shall be unlawful for the commissioner or any officer or employee of the department to divulge or make known in any manner the amount of income or any other particulars set forth in any verified statement filed with him hereunder or report made to him pursuant to this subdivision; but nothing contained herein shall be considered to prohibit

*Session Laws of New York***§ 563. Commissioner; powers**

The commissioner shall have responsibility for the administration of the program created by this article and may promulgate such regulations as are necessary to carry out the provisions of this article. The amount required to be paid under the provisions of this article shall be payable on order and warrant of the comptroller on vouchers certified or approved by the commissioner in the manner provided by law.

§ 3. Legislative findings. The legislature hereby finds and declares that:

1. Statutes already provide for the deduction from gross income for tax purposes of amounts contributed to religious, charitable and educational institutions.

2. Nonpublic educational institutions are themselves entitled to a tax exempt status by virtue of legislation which has been sustained by the courts.

3. Such educational institutions not only provide education for the children attending them, but by their existence, relieve the taxpayers of the state of the burden of providing public school education for those children.

4. Tax laws also authorize deductions for education related to employment.

5. The legislature hereby finds and determines that similar modifications of federal adjusted gross income should also be provided to parents for tuition paid to nonpublic elementary and secondary schools on behalf of their dependents for whom exemptions are claimed under the tax law.

§ 4. Subsection (c) of section six hundred twelve of the tax law is hereby amended by adding thereto a new paragraph, to be paragraph fourteen, to read as follows:

(14) The amount that may be subtracted from federal adjusted gross income pursuant to subsection (j) of this section.

§ 5. Section six hundred twelve of such law is hereby amended by adding thereto a new subsection, to be subsection (j), to read as follows:

(j) Modification for nonpublic school tuition. (1) General. An individual shall be entitled to subtract from his federal adjusted gross income an amount shown in the table set forth in this paragraph for his New York adjusted gross income for the taxable year, computed without the benefit of this modification, multiplied by the number of his dependents, not exceeding three, attending a nonpublic school on a full-time basis for at least four months during the regular school year for the education of such dependent in grades one through twelve, provided such individual is allowed an exemption under section six hundred sixteen for such dependent. Provided, further, that the modification under this paragraph may be taken only if such individual has paid at least fifty dollars for each such dependent in tuition to a nonpublic school for such education of such dependent. No tax-

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§ 562. Tuition reimbursement payments to parents

1. Upon the filing by a parent of the verified statement as required by subdivision two, the commissioner shall make a tuition reimbursement payment to such parent for tuition expenses made in the preceding calendar year. Only one such payment shall be made on behalf of any pupil in a calendar year. Such payment shall be the lesser of either (a) fifty percent of the tuition paid by the parent during the preceding calendar year for the elementary or secondary education of each pupil, or (b) five dollars per month for the period of enrollment in a nonpublic school during the regular school year for each pupil in grades one through eight, and ten dollars per month for the period of enrollment in a nonpublic school during the preceding regular school year for each pupil in grades nine through twelve. Whenever payments as herein computed total less than ten dollars, no such payment shall be made.

2. In order to be eligible for tuition reimbursement hereunder, the parent of a pupil shall, by May first of the year following the calendar year for which reimbursement is sought, file with the commissioner a verified statement, in such form as he shall provide, stating that the pupil was enrolled during such year in a nonpublic school or schools and, in addition, the following information: (a) the name, address and taxable income of the parent; (b) the name, address and birth date of the pupil; (c) the grade in which the pupil was enrolled during each month in a nonpublic school in such year; (d) the name and address of the nonpublic school or schools attended by such pupil; (e) a receipted tuition bill. For reimbursement for the calendar year nineteen hundred seventy-one, such verified statement shall be filed not later than July first, nineteen hundred seventy-two.

3. No parent shall be eligible to receive a tuition reimbursement payment who has claimed a modification of federal adjusted gross income for nonpublic school tuition pursuant to paragraph fourteen of subsection (c) of section six hundred twelve of the tax law based upon the same tuition expenditures.

4. The state tax commission shall, when requested by the commissioner, compare any verified statement filed with the commissioner pursuant to this article with the state income tax returns if any, filed by the parent making such verified statement and shall report any discrepancies to the commissioner. All verified statements filed with the commissioner and all reports made to him by the state tax commission, pursuant to this article shall be deemed confidential and, except in accordance with proper judicial order or as otherwise prescribed by law, it shall be unlawful for the commissioner or any officer or employee of the department to divulge or make known in any manner the amount of income or any other particulars set forth in any verified statement filed with him hereunder or report made to him pursuant to this subdivision; but nothing contained herein shall be considered to prohibit the commissioner's publication of statistics so classified as to prevent the identification of particular affidavits or reports.

§ 563. Commissioner; powers

The commissioner shall have responsibility for the administration of the program created by this article and may promulgate such regulations as are necessary to carry out the provisions of this article. The amount required to be paid under the provisions of this article shall be payable on order and warrant of the comptroller on vouchers certified or approved by the commissioner in the manner provided by law.

§ 3. Legislative findings. The legislature hereby finds and declares that:

1. Statutes already provide for the deduction from gross income for tax purposes of amounts contributed to religions, charitable and educational institutions.

2. Nonpublic educational institutions are themselves entitled to a tax exempt status by virtue of legislation which has been sustained by the courts.

3. Such educational institutions not only provide education for the children attending them, but by their existence, relieve the taxpayers of the state of the burden of providing public school education for those children.

4. Tax laws also authorize deductions for education related to employment.

5. The legislature hereby finds and determines that similar modifications of federal adjusted gross income should also be provided to parents for tuition paid to nonpublic elementary and secondary schools on behalf of their dependents for whom exemptions are claimed under the tax law.

§ 4. Subsection (e) of section six hundred twelve of the tax law is hereby amended by adding thereto a new paragraph, to be paragraph fourteen, to read as follows:

(14) The amount that may be subtracted from federal adjusted gross income pursuant to subsection (j) of this section.

§ 5. Section six hundred twelve of such law is hereby amended by adding thereto a new subsection, to be subsection (j), to read as follows:

(j) Modification for nonpublic school tuition. (1) General. An individual shall be entitled to subtract from his federal adjusted gross income an amount shown in the table set forth in this paragraph for his New York adjusted gross income for the taxable year, computed without the benefit of this modification, multiplied by the number of his dependents, not exceeding three, attending a nonpublic school on a full-time basis for at least four months during the regular school year for the education of such dependent in grades one through twelve, provided such individual is allowed an exemption under section six hundred sixteen for such dependent. Provided, further, that the modification under this paragraph may be taken only if such individual has paid at least fifty dollars for each such dependent in tuition to such nonpublic school for such education of such dependent. No taxpayer shall be entitled to the modification provided for in this para-

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graph if he claims a tuition reimbursement payment pursuant to article twelve-A of the education law.

<u>If New York adjusted gross income is:</u>	<u>The amount allowable for each dependent is:</u>
<u>Less than \$9,000</u>	<u>\$1,000</u>
<u>9,000—10,999</u>	<u>850</u>
<u>11,000—12,999</u>	<u>700</u>
<u>13,000—14,999</u>	<u>550</u>
<u>15,000—16,999</u>	<u>400</u>
<u>17,000—18,999</u>	<u>250</u>
<u>19,000—20,999</u>	<u>150</u>
<u>21,000—22,999</u>	<u>125</u>
<u>23,000—24,999</u>	<u>100</u>
<u>25,000 and over</u>	<u>—0—</u>

(2) Husband and wife. In determining the applicable New York adjusted gross income of a husband and wife for purposes of the table set forth in paragraph one of this subsection, the New York adjusted gross income of a husband and wife shall be the aggregate of their New York adjusted gross incomes for the taxable year, determined without the benefit of the modification provided for in this subsection, and the number of dependents with respect to which this modification may be claimed shall be no more than three in the aggregate.

(3) Definitions. (A) "Tuition", as used in this subsection, shall mean the amount actually paid during the taxable year by the taxpayer for the enrollment of a dependent during the regular school year at a nonpublic school.

(B) "Nonpublic school", as used in this subsection, shall mean any non-profit elementary or secondary school in the state of New York, other than a public school, which (i) is providing instruction in accordance with article seventeen and section thirty-two hundred four of the education law, (ii) has not been found to be in violation of Title VI of the Civil Rights Act of nineteen hundred sixty-four, 78 Stat. 252, 42 U.S.C. § 2000(d) ¹ and (iii) which is entitled to a tax exemption under sections five hundred one (a) and five hundred one (c) (3) of the Federal Internal Revenue Code of nineteen hundred fifty-four, ² as amended. The commissioner of education shall furnish to the state tax commission by February first of each year, a certified list of nonpublic schools which comply with clause (i) of this subparagraph for the preceding calendar year and shall provide such other assistance with respect to whether nonpublic schools come within clause (i) as the state tax commission may require.

(C) "Regular school year", as used in this subsection, shall mean the months of the taxable year exclusive of July and August.

(4) Additional information. Any claim for a modification under this subsection shall be accompanied by such information as the tax commission may require.

¹ 42 U.S.C.A. § 2000(d).

² 26 U.S.C.A. (I.R.C. 1954) § 501(c), (c) (3).

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§ 6. Legislative findings. The legislature hereby finds and declares that:

Since September of nineteen hundred sixty-six when nonpublic enrollment reached a zenith of 891,000 pupils, the enrollment of such schools has shown a constant and unmistakable decline. Fewer than 760,000 students were enrolled in September of nineteen hundred seventy-one. The severity of the fiscal crisis confronting nonpublic education threatens to change what has been a gradual transition of pupils into a sudden and precipitous collapse of nonpublic education. Such a collapse would seriously jeopardize the quality of education for all students and worsen an already serious fiscal crisis in the public schools.

Additional financial assistance to public school districts cannot prevent the disruption of the educational process which a massive infusion of new students would precipitate. It can, however, partially alleviate the enormous, and perhaps intolerable, fiscal burden that must be borne by the property taxpayers of school districts. Urban school districts, which contain a majority of the nonpublic school enrollment, are particularly affected, since their ability to raise property tax revenues is curtailed by constitutional tax limits. Therefore, it is declared to be the policy of this State to provide additional financial assistance for those impacted public school districts in accordance with the provision contained herein.

§ 7. Section thirty-six hundred two of the education law is hereby amended by adding thereto a new subdivision, to be subdivision fifteen, to read as follows:

15. Impacted aid. In addition to the foregoing apportionments there shall be apportioned to any school district which experiences an increase in student enrollment during the school year commencing July first, nineteen hundred seventy-two or any year thereafter because of the closing in whole or in part of a nonpublic school, or campus school, an amount computed as herein provided.

a. Definitions. As used herein:

1. enrolled student shall mean any student currently enrolled in a public school of any school district or borough who attended a nonpublic school, or campus school, during either the base year or current year and whose enrollment in such public school was caused by the closing in whole or in part of a nonpublic school.

2. borough shall mean any borough of the city school district of the city of New York.

3. aid ratio shall mean the higher of the actual aid ratio established for such district or borough, or thirty-six per centum.

b. Computation. The amount to be apportioned shall be the product of:

1. the number of enrolled students in any school district or borough multiplied by one hundred dollars; and

2. the aid ratio of such school district or borough.

c. The city school district of the city of New York shall be entitled to compute such apportionment using the enrolled students and aid ratio for each such borough.

d. Any apportionment as herein computed shall be subject to regulations promulgated by the commissioner and shall not be deducted in

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determining approved operating expenses of the district for the purpose of computation of any apportionment pursuant to subdivision five of this section.

e. The apportionment as herein computed shall be paid in accordance with the provisions of section thirty-six hundred nine of such law during the current school year and the school year next succeeding such year.

§ 8. Subdivisions one, two and three of section four hundred eight of the education law, subdivision one having been last amended by chapter two hundred fifty-seven of the laws of nineteen hundred sixty-five, subdivision two having been amended by chapter nine hundred thirty-three of the laws of nineteen hundred seventy-one, and subdivision three having been amended by chapter seven hundred eighty-one of the laws of nineteen hundred fifty-one, are hereby amended to read, respectively, as follows:

1. No schoolhouse shall hereafter be erected, purchased, repaired, enlarged or remodeled in any school district except in a city school district in a city having seventy thousand inhabitants or more, at an expense which shall exceed one hundred thousand dollars, until the plans and specifications thereof shall have been submitted to the commissioner of education and his approval endorsed thereon. Such plans and specifications shall show in detail the ventilation, heating and lighting of such buildings.

In the case of a school district in a city having seventy thousand inhabitants or more, all the provisions previously set forth in this subdivision shall apply, except that the commissioner may waive the requirement for submission of plans and specifications and substitute therefor the requirement for submission of an outline of such plans and specifications for his review. Such outline shall be in a form which he may prescribe from time to time.

In either case, the commissioner may, in his discretion, review plans and specifications for projects estimated at an expense of less than one hundred thousand dollars.

In the case of a school district in a city having a million inhabitants or more, all of the provisions previously set forth in this subdivision shall apply, except that such school district shall only be required to submit an outline of the plans and specifications to the commissioner of education for his information where a schoolhouse is to be erected in conjunction with the development of a project to be developed under the provisions of article two or five of the private housing finance law and where both the school and the project are to have rights or interests in the same land, regardless of the similarity or equality thereof, including fee interests, easements, space rights or other rights or interests.

2. The commissioner of education shall not approve the plans for the erection or purchase of any school building or addition thereto or remodeling thereof unless the same shall provide for heating, ventilation, lighting, sanitation, storm drainage and health, fire and accident protection adequate to maintain healthful, safe and comfortable conditions therein and unless the county superintendent of highways or commissioner of public works has been advised of the location of all temporary and permanent entrances and exits upon all public highways and the storm drainage plan which is to be used.

3. The commissioner of education shall approve the plans and specifications, heretofore or hereafter submitted pursuant to this section, for the erection or purchase of any school building or addition thereto.

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or remodeling thereof on the site or sites selected therefor pursuant to this chapter, if such plans conform to the requirements and provisions of this chapter and the regulations of the commissioner adopted pursuant to this chapter in all other respects; provided, however, that the commissioner of education shall not approve the plans for the erection or purchase of any school building or addition thereto unless the site has been selected with reasonable consideration of the following factors; its place in a comprehensive, long-term school building program; area required for outdoor educational activities; educational adaptability, environment, accessibility; soil conditions; initial and ultimate cost.

§ 9. Section four hundred eight of such law is hereby amended by adding thereto a new subdivision, to be subdivision six, to read as follows:

6. The commissioner may promulgate regulations relating to the purchase of existing school buildings. Such regulations shall provide for an appraisal of such buildings as school buildings, and the land on which they are situated¹ as school sites by the state board of equalization and assessment, such estimates of the cost of renovation and construction as may be necessary and limitations on the cost of acquisition and renovation, in taking into consideration the age and condition of such existing buildings, in relation to the estimated cost of constructing a new building containing comparable facilities. Such regulations may also require the prior approval of the commissioner of any renovations proposed to be made to such existing school buildings.

¹ So in original. Probably should read "situated".

§ 10. The opening paragraph and paragraph a of subdivision six of section thirty-six hundred two of such law, the opening paragraph having been separately amended by chapters eight hundred forty-seven and nine hundred thirty-one of the laws of nineteen hundred seventy-one and paragraph a having been amended by chapter two hundred thirty-four of the laws of nineteen hundred seventy, are hereby amended to read, respectively, as follows:

Apportionment for capital outlays and debt service for school building purposes. Any apportionment to a school district pursuant to this subdivision shall be based upon base year approved expenditures for capital outlays from its general fund, capital fund or reserved funds and current year approved expenditures for debt service and lease or other annual payments to the New York city educational construction fund created by article ten of this chapter or the city of Yonkers educational construction fund created by article ten-B of this chapter which have been pledged to secure the payment of bonds, notes or other obligations issued by the fund to finance the construction, acquisition, reconstruction, rehabilitation or improvement of the school portion of combined occupancy structures, or for lease or other annual payments to the New York state urban development corporation created by chapter one hundred seventy-four of the laws of nineteen hundred and sixty-eight, pursuant to agreement between such school district and such corporation relating to the construction, acquisition, reconstruction, rehabilitation or improvement of any school building. In any such case approved expenditures shall be only for new construction, reconstruction, purchase of existing structures, for site purchase and improvement, for new garages, for original equipment, furnishings, machinery, or apparatus, and for professional fees and other costs in-

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cidental to such construction or reconstruction, or purchase of existing structures.

a. For capital outlays for such purposes first incurred on or after July first, nineteen hundred sixty-one and debt service for such purposes first incurred on or after July first, nineteen hundred sixty-two, the actual approved expenditures less the amount of civil defense aid received pursuant to the provisions of section thirty-five of the laws of nineteen hundred fifty-one as amended shall be allowed for purposes of apportionment under this subdivision but not in excess of the following schedule of cost allowances:

(1) For new construction and the purchase of existing structures the cost allowances shall be based upon the rated capacity of the building or addition and shall be not more than one thousand dollars per pupil for a building or an addition housing grades kindergarten through six, nor more than fourteen hundred dollars per pupil for a building or an addition housing grades seven through nine, nor more than fifteen hundred dollars per pupil for a building or an addition housing grades seven through twelve. Rated capacity of a building or an addition shall be determined by the commissioner based on space standards and other requirements for building construction specified by the commissioner. Such allowances shall be corrected by an index number established by the commissioner reflecting changes in the costs of labor and materials from December first, nineteen hundred fifty.

(2) Where a school district has expenditures for site purchase, grading or improvement of the site, original furnishings, equipment, machinery or apparatus, or professional fees, or other incidental costs, the cost allowances for new construction and the purchase of existing structures may be increased by the actual expenditures for such purposes but by not more than twenty per centum for school buildings or additions housing grades kindergarten through six and by not more than twenty-five per centum for school buildings or additions housing grades seven through twelve.

(3) Cost allowances for reconstructing or modernizing structures shall not exceed fifty per centum of the cost allowances for new construction.

§ 11. If any clause, sentence, paragraph, section or part of this act shall be adjudged by any court of competent jurisdiction to be invalid, such judgment shall not affect, impair or invalidate the remainder thereof, but shall be confined in its operation to the clause, sentence, paragraph, section, or part thereof directly involved in the controversy in which such judgment shall have been rendered.

§ 12. This act shall take effect immediately, except that sections seven, eight and nine shall take effect July first, nineteen hundred seventy-two, and the provisions of paragraph (14) of subsection (c) of section six hundred twelve of the tax law, as added by section four of this act, shall apply to all taxable years beginning after December thirty-first, nineteen hundred seventy-one.

APPENDIX C

Order and Judgment

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

72 Civ. 2286

COMMITTEE FOR PUBLIC EDUCATION AND RELIGIOUS LIBERTY,
BERT ADAMS, BERNARD BACKER, ALGERNON D. BLACK,
THEODORE BROOKS, HERSCHEL CHANIN, NAOMI A. COWEN,
ROBERT B. ESSEX, FLORENCE FLAST, REBECCA GOLDBLUM,
BENJAMIN HAIBLUM, MARTHA LATIES, BLANCHE LEWIS,
ELLEN A. MEYER, EDWARD D. MOLDOVER, ARYEH NEIER,
DAVID SEELEY, ALBERT SHANKER, HOWARD M. SQUADRON,
and CHARLES H. SUMNER,

Plaintiffs,

—against—

EWALD B. NYQUIST, as Commissioner of Education of the
State of New York, ARTHUR LEVITT, as Comptroller of
the State of New York, and NORMAN GALLMAN, as Com-
missioner of Taxation and Finance of the State of New
York,

Defendants,

—and—

GERALDINE M. BOYLAN, PRISCILLA L. CHERRY, JOAN M. DUCEY,
NORA H. FERGUSON, ANGELINA M. FERRARELLA, ERNEST E.
ROOS, JR. and ADAMINA RUIZ,

Intervenor-Defendants,

—and—

SENATOR EARL W. BRYDGES, as Majority Leader and
President Pro Tem of the New York State Senate,

Intervenor-Defendant.

Order and Judgment

Plaintiffs' motion for the convening of a three-judge District Court pursuant to 28 U.S.C. §§ 2281, 2284 having come on to be heard on June 20, 1972 before the Hon. Murray Gurfein, United States District Judge, and the parties having conceded at that time that this action required the convening of a three-judge District Court, and Judge Gurfein having set the matter down for a hearing during the week of July 3, 1972 upon a representation that there were no factual issues involved; and the case having thereafter come on to be heard on the merits on July 6, 1972 before Judge Gurfein, the Hon. Paul R. Hays, United States Circuit Judge, and the Hon. John M. Cannella, United States District Judge, and all parties having submitted briefs and presented oral argument; and the Court, after due deliberation, having concluded on July 21, 1972 that Section 1 of Chapter 414 of the 1972 Laws of New York is in violation of the Establishment Clause of the First Amendment to the United States Constitution, and the Court having set forth the reasons for this decision in an opinion dated October 2, 1972; and the Court having further concluded in its opinion of October 2, 1972 that Section 2 of Chapter 414 is unconstitutional and that Sections 3, 4 and 5 of Chapter 414 are not in violation of the Establishment Clause of the First Amendment, Judge Hays dissenting with respect to Sections 3, 4 and 5 of Chapter 414; and the Court having directed that judgment be entered, permanently enjoining enforcement of Sections 1 and 2 of Chapter 414; and the Court having further stated that the parties may move for summary judgment or for an expedited trial with respect to Section[s] 3 [and 4 and 5] of Chapter 414; and defendant and intervenor-defendants having duly moved for summary

Order and Judgment

judgment dismissing the complaint with respect to Sections 3, 4 and 5 of Chapter 414;

Now, upon all of the proceedings heretofore had herein, it is hereby

ORDERED, ADJUDGED AND DECREED that Section 1 of Chapter 414 of the 1972 Laws of New York is unconstitutional in that it violates the Establishment Clause of the First Amendment to the United States Constitution; and it is further

ORDERED that the defendants and their agents and all persons acting for or on behalf of the State of New York be, and they hereby are, permanently enjoined from making any payments or disbursements out of State funds pursuant to the provisions of Section 1 of Chapter 414 of the 1972 Laws of New York in payment for or reimbursement of any moneys heretofore or hereafter expended by nonpublic elementary and secondary schools for maintenance and repair; and it is further

ORDERED, ADJUDGED AND DECREED that Section 2 of Chapter 414 of the 1972 Laws of New York is unconstitutional in that it violates the Establishment Clause of the First Amendment to the United States Constitution; and it is further

ORDERED that the defendants and their agents and all persons acting for or on behalf of the State of New York be, and they hereby are, permanently enjoined from making any payments or disbursements out of State funds pursuant to the provisions of Section 2 of Chapter 414 of the 1972 Laws of New York in payment for or reimbursement of

Order and Judgment

any tuition payments heretofore or hereafter made to non-public elementary and secondary schools; and it is further

ORDERED, ADJUDGED AND DECREED that Sections 3, 4 and 5 of the 1972 Laws of New York do not violate the Establishment Clause of the First Amendment to the United States Constitution; and it is further

ORDERED that defendants' and intervenor-defendants' motion for summary judgment with respect to Sections 3, 4 and 5 of Chapter 414 of the 1972 Laws of New York be, and it hereby is, granted; and it is further

ORDERED that the complaint, insofar as it seeks a permanent injunction against enforcement of Sections 3, 4 and 5 of Chapter 414 of the 1972 Laws of New York, be, and it hereby is, dismissed.

Dated: New York, New York
October 20, 1972

PAUL R. HAYS, *U.S.C.J.*
JOHN M. CANNELLA, *U.S.D.J.*
MURRAY I. GURFEIN, *U.S.D.J.*

ENTERED:

10/20/72 JOHN LIVINGSTON
Clerk

APPENDIX D

**Notice of Appeal to the Supreme Court
of the United States**

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

72 Civ. 2286

COMMITTEE FOR PUBLIC EDUCATION AND RELIGIOUS LIBERTY,
BERT ADAMS, BERNARD BACKER, ALGERNON D. BLACK,
THEODORE BROOKS, HERSCHEL CHANIN, NAOMI A. COWEN,
ROBERT B. ESSEX, FLORENCE FLAST, REBECCA GOLDBLUM,
BENJAMIN HAIBLUM, MARTHA LATIES, BLANCHE LEWIS,
ELLEN A. MEYER, EDWARD D. MOLDOVER, ARYEH NEIER,
DAVID SEELEY, ALBERT SHANKER, HOWARD M. SQUADRON,
and CHARLES H. SUMNER,

Plaintiffs,

—against—

EWALD B. NYQUIST, as Commissioner of Education of the
State of New York, ARTHUR LEVITT, as Comptroller of
the State of New York, and NORMAN GALLMAN, as Com-
missioner of Taxation and Finance of the State of New
York,

Defendants,

—and—

GERALDINE M. BOYLAN, PRISCILLA L. CHERRY, JOAN M. DUCEY,
NORA H. FERGUSON, ANGELINA M. FERRARELLA, ERNEST E.
ROOS, JR. and ADAMINA RUIZ,

Intervenor-Defendants,

—and—

SENATOR EARL W. BRYDGES, as Majority Leader and
President Pro Tem of the New York State Senate,

Intervenor-Defendant.

Notice of Appeal to the Supreme Court of the United States

NOTICE IS HEREBY GIVEN that the plaintiffs herein appeal to the Supreme Court of the United States from that part of the final order and judgment entered in this action on October 20, 1972 which (a) declares that Sections 3, 4 and 5 of Chapter 414 of the 1972 Laws of New York do not violate the Establishment Clause of the First Amendment of the United States Constitution; (b) granted defendants' and intervenor-defendants' motion for summary judgment with respect to Sections 3, 4 and 5 of Chapter 414 of the New York Laws of 1972; and (c) dismisses the complaint herein insofar as it seeks a permanent injunction against enforcement of Sections 3, 4 and 5 of Chapter 414 of the New York Laws of 1972.

This appeal is taken pursuant to 28 U.S.C., Section 1253.

~~Dated: October 30,~~
November 3,
1972

LEO PFEFFER
Attorney for Plaintiffs

To:

JOHN LIVINGSTON, *Clerk*
United States District Court for the
Southern District of New York
Foley Square
New York, New York 10007

LOUIS J. LEFKOWITZ
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Notice of Appeal to the Supreme Court of the United States

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